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The upshot was that Congress eventually qualified the NEA's granting authority, providing that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."142 In 1992 this qualification was challenged by four individual performance artists, as well as by the National Association of Artists' Organizations. In Finley v. NEA,143 a federal district court declared the "'decency' clause . void for vagueness under the Fifth Amendment and . . . overbroad under the First Amendment."144

The constitutional issues posed by Finley contrast neatly with those presented by League of Women Voters. The decisive question in League of Women Voters was whether the editorials of noncommercial broadcasters should be characterized as public discourse. Once this question was answered affirmatively, it was relatively unproblematic to characterize section 399's prohibition as directly restricting public discourse. In Finley, however, the artistic work supported by NEA grants may for the most part unproblematically be regarded as part of public discourse.145 But by contrast it is not at all clear whether the decency clause struck down by Finley should be understood as a direct regulation of the speech of NEA grantees, or instead as a rule directed at the internal operation of the NEA.146 Unlike League of Women Voters, therefore, Finley poses the question of how to characterize government action.

An analogous ambiguity of characterization would arise if, for example, Congress were to enact a statute prohibiting "indecent" magazines from receiving the subsidy of second-class mailing privileges. Accepting as uncontroversial premises that the Postal Service is an organization subject to direction by Congress, that those using the mail must comply with postal regulations, and that magazines flowing through the mail are public discourse, we must nevertheless face the question of how the ban on indecent magazines should be characterized: as a regulation of public discourse or as a rule directed at the internal operation of the Post Office.

The question exposes an unexplored assumption in the way in which I have so far presented the relationship between public discourse and managerial domains. I have spoken as if one could draw a sharp distinction between the state and its citizens, as though the realm of democratic self-determination functioned in isolation from systems of government intervention and support. But of course this is not the case under contemporary conditions; instrumental organizations of government presently infiltrate almost all aspects of social life. Organizational theorists have long recognized that institutional boundaries are open and porous. "The organization is the total set of interstructured activities in which it is engaged at any one time and over which it has discretion to initiate, maintain, or end behaviors. . . . The organization ends where its discretion ends and another's begins."147 For this reason one can always ask whether the internal rules of a state organization should constitutionally be categorized as equivalent to the regulation of ambient domains of social life. We would almost certainly view a statute barring indecent magazines from second-class mailing subsidies as a direct regulation of public discourse rather than as an internal guideline of the Post Office. To appropriate the vocabulary of Meir Dan-Cohen, we would classify it as a "conduct rule" for the government of citizens, rather than as a "decision rule" for the internal direction of government officials.148 I strongly suspect that our reason for doing so is that magazines are so completely dependent on the operation of the mail that the statute would as a practical matter function to

disable magazines branded as indecent.149 In such a case we might even go so far as to agree with Owen Fiss's observation that "the effect of a denial" of a subsidy "is roughly equivalent to that of a criminal prosecution."150

But this equivalence, if it exists, is practical, not theoretical. It derives from the particular way in which subsidies for second-class mailing privileges have infiltrated their social environment. We can easily imagine counterexamples. Consider, for instance, the Kennedy Center, which the federal government subsidizes to "present classical and contemporary music, opera, drama, dance, and other performing arts."151 These criteria for the allocation of subsidies exclude political and academic speech. Such speech is of course public discourse, yet its dependence upon the Center is so slight that we would not be tempted to read the effects of the government's exclusions as "roughly equivalent to that of a criminal prosecution." We would interpret the exclusions instead as decision rules for the internal direction of the Center's administrators. The exclusions would be constitutionally characterized as instrumental regulations confined to a managerial domain, rather than as general regulations of public discourse.152

Cases of subsidized speech thus typically raise two independent issues of constitutional characterization. The first refers to the characterization of speech, and it requires us to determine whether subsidized speech is within public discourse or whether it is within some other constitutional domain. The second refers to the characterization of government action, and it requires us to determine whether standards allocating state subsidies should be regarded as conduct rules or as decision rules.

The characterization of government action entails judgments that are contextual and multidimensional. The nature of the action is certainly one factor to be considered. It matters whether a government allocation rule actually forbids behavior (like section 399 in League of Women Voters) or whether it simply constrains the provision of a subsidy (like the statute establishing the Kennedy Center). The former appears far more analogous to the regulation of conduct than the latter. Also relevant are the many considerations identified in the rich academic discussion of unconstitutional conditions doctrine. Seth Kreimer's herculean efforts to assess the allocation of government benefits by reference to the triple baselines of "history," "equality," and "prediction" strike me as indispensable.153 Kreimer's baselines reveal, for example, how subsidies can come to be experienced like entitlements because they have become so integrated into the fabric of everyday life. The case of the traditional public forum illustrates how we tend to characterize standards allocating such "entitlements" as conduct rules.154 Kathleen Sullivan's magisterial explication of the ways in which the allocation of government benefits "determine the overall distribution of power between government and rightholders generally"155 is equally indispensable. Sullivan's work underscores situations in which public discourse has become practically dependent upon government organizations. Thus the symbiotic connection of magazine publications to second-class mailing subsidies helps to explain why we tend to characterize the allocation of such subsidies as direct regulations of public discourse.

B. The Constitutional Distinction Between Conduct Rules and Decision Rules

We must decide, therefore, how the NEA "decency clause" should be characterized: as a conduct rule directly regulating public discourse or

instead as a decision rule directing NEA officials to intervene in public discourse to achieve a distinct objective. It is noteworthy that the court in Finley does not explore this question. It instead merely assumes that because artistic expression is part of public discourse, the decency clause ought to be regarded as equivalent to the regulation of public discourse. The court characterizes the clause as an attempt "to suppress speech that is offensive to some in society."156 Finley therefore uses standard First Amendment doctrines prohibiting vagueness and overbreadth to conclude that the clause is unconstitutional. The conclusion is indeed unobjectionable on the assumption that these doctrines are appropriately applied, but this assumption would not be correct if the decency clause were to be categorized as a decision rule for the guidance of NEA decisionmakers.

The doctrine of vagueness, for example, is not ordinarily enforced in the context of decision rules, for "(t)he rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers."157 This can be seen most dramatically in the context of the FCC, which is authorized by statute to grant, review, and modify licenses subject to the highly indeterminate standard of "public convenience, interest, or necessity."158 It would surely be strange to hold that a "decency" standard is unconstitutionally vague, but that a "public interest" standard is not.

The Finley court's appeal to overbreadth theory would be similarly problematic if the decency clause were to be regarded as a decision rule. Finley correctly cites precedents standing for the proposition that conduct rules designed to censor indecent public discourse should be struck down as unconstitutionally overbroad.159 These precedents, however, do not control with regard to decision rules that administer managerial domains. We know, for example, that within managerial domains, the Supreme Court has specifically upheld the proscription of "indecent" speech where it has deemed such regulation necessary for the accomplishment of legitimate purposes. The inculcation of "the habits and manners of civility" within a high school has been held to constitute one such purpose.160 If the NEA decency clause is seen as a decision rule, the precise constitutional question posed, therefore, is whether the government can organize itself in order to intervene in public discourse so as to promote the value of decency. This is a difficult question that must be directly and substantively analyzed; it cannot be settled by offhand references to overbreadth.

This analysis suggests that significant constitutional consequences follow from the classification of the NEA decency clause as a conduct rule or as a decision rule. To conceptualize the clause as a conduct rule regulating public discourse is to subject it to the usual First Amendment standards restricting such regulations. What is striking, however, is that these standards would render unconstitutional not merely the clause itself, but also the larger criterion of "artistic excellence." It would be flatly unconstitutional for the state to regulate public discourse in a way that penalizes art deemed insufficiently excellent.161 Imagine, for example, a congressional statute that seeks to improve public culture by excluding from second-class mailing subsidies magazines with short stories deemed by the Postal Service inadequate when measured by a standard of "artistic excellence."

The most general statement of this point is that regulations of public discourse must meet stringent criteria of neutrality to ensure that public discourse is not subordinated to community values, and NEA grant criteria

would be no exception. To conceptualize the criteria as regulations of public discourse would therefore probably impose upon the NEA the obligation to "parcel out its limited budget on a purely content-neutral, first-come-firstserved basis as governments must do in allocating use of a public forum."162 Such an obligation would create powerful disincentives for the investment of government support, because that support could no longer be oriented toward the advancement of specific values.163

First Amendment analysis would follow a very different trajectory, however, if we were to classify the NEA decency clause as a decision rule, which is to say as an internal policy guideline directing the NEA to intervene into public discourse to encourage and facilitate excellent art that is also decent.164 The state may participate in public discourse to accomplish purposes that the First Amendment forbids the state from seeking to accomplish directly by regulating public discourse.165 Thus the government can operate the Kennedy Center to encourage "music, opera, drama, dance, and other performing arts," although it could not directly regulate public discourse to accomplish the same end.166 Even if the state cannot directly regulate public discourse so as "to ensure that a wide variety of views reach the public,"167 the FCC can nevertheless constitutionally establish a managerial domain that includes broadcasters, and it can promulgate the fairness doctrine within that domain in order to serve the purpose of ensuring that "the public receive . . . suitable access to social, political, esthetic, moral, and other ideas and experiences."168 Or, to bring the matter closer to the precise question that we are discussing, the state can surely intervene into public discourse to promote "excellent art," whether through the establishment of public orchestras or museums or through the provision of NEA grants, even if the government could not directly regulate public discourse to achieve that purpose.

So long as the allocation criteria for state subsidies are conceptualized as decision rules addressed to the administrators of state organizations, they can be justified by reference to a far broader array of purposes than would be permissible if they were regarded as conduct rules regulating public discourse.169 The basic reason for this asymmetry is that the state is prohibited from imposing any particular conception of collective identity when it regulates public discourse,170 but the state must perforce exemplify a particular conception of collective identity when it acts on its own account.1 Just as the President can speak out in favor of a particular vision of community values,172 so can the government organize itself through institutions to support and nourish that vision.

The constitutional importance of empowering the state to express and sustain shared beliefs is what I believe Chief Justice Rehnquist sought to express in his often-cited observation in Regan that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."173 Although Rehnquist's formulation is unfortunately overbroad and decontextualized, the core of his insight is that when the government is authorized to act in its own name as a representative of the community, its decision to promote one value cannot by itself carry an internal constitutional compulsion simultaneously to support other values.174

It follows from this conclusion that viewpoint discrimination alone will never be a sufficient ground for striking down decision rules.175 Whenever the state acts to support a particular conception of community identity, it will engage in viewpoint discrimination with respect to that conception. So, for

example, if the NEA allocates grants to support artistic excellence, it must adopt a perspective about the meaning of that value; if the value is contested, the NEA's perspective will necessarily be viewpoint discriminatory from the standpoint of those who hold a different interpretation of the value.176

C. First Amendment Limitations on Decision Rules

We now face something of a conundrum, however, for if decision rules that guide government interventions into public discourse can exemplify and advance particular community values, and if they can therefore discriminate on the basis of viewpoint, what general First Amendment limitations, if any, can be applied to them? The only plausible source for such limitations would lie in what I have elsewhere called the "collectivist" theory of the First Amendment, which was the basis of the Supreme Court's reasoning in Red Lion.177 In that case the Supreme Court held that the constitutionality of the FCC's fairness doctrine should be assessed in terms of its consistency with "the ends and purposes of the First Amendment," which the Court defined in terms of the necessity to "preserve an uninhibited marketplace of ideas" and to ensure that the public "receive suitable access to social, political, esthetic, moral and other ideas and experiences."178 Surely decision rules inconsistent with these ends and purposes ought to be unconstitutional.

Red Lion, however, involved the regulatory authority of the state. At issue was the FCC's promulgation of rules restricting the expression of broadcasters, albeit that the broadcasters' speech was itself regarded as outside of public discourse. Even on the assumption that direct managerial regulation of expression should be unconstitutional if it unduly constricts the diversity and vigor of broadcasters' speech,179 it is not apparent how this conclusion can be translated to the context of decision rules that do not directly regulate speech but instead serve as guidelines for government intervention into public discourse.

Consider, for example, the difficulty we would face in applying the Red Lion standard to the subsidies at issue in Finley. In contrast to regulation, subsidies create speech. By hypothesis each subsidy that is awarded increases the absolute quantity of public discourse.180 How, then, could granting subsidies ever be construed as constricting expression? To apply Red Lion, therefore, we would have to interpret the collectivist theory as prohibiting not merely the outright reduction of speech, but also the distortion of public discourse. Subsidies that emphasize one perspective or another, one value or another, might be thought to skew public discourse, to deform artificially its natural diversity and spontaneous heterogeneity, and to be unconstitutional for these reasons.

The problem with this line of analysis, however, is that it is not obvious how to give useful content to the concept of "distortion" once it is accepted that the government may allocate grants to support particular values. Every government intervention in public discourse will change the nature of that discourse. If the state gives prize money to fund a competition for the best essay on environmental protection rather than on geography, or if it supports research on the history of America rather than on that of ancient Macedonia, or if it issues grants to excellent art, or to local art, or to performance art, it will have had both the purpose and effect of influencing the shape of public discourse. Such influence is the necessary consequence of abandoning the standards of content and viewpoint neutrality that we ordinarily impose on

state regulations of public discourse.

We could attempt to circumvent this difficulty by arguing that while some kinds of distortion of public discourse are inevitable and tolerable, other kinds are not. Imagine, for example, if Congress were to enact a statute requiring the NEA to distribute grants only to art supportive of the party in control of Congress. Our immediate and strong intuition is that such a statute should be struck down as unconstitutional. Surely this intuition indicates that there are limits to the kinds of distortion that we would be willing to accept.

The constitutional grounds of this intuition, however, are somewhat puzzling. The intuition cannot rest merely on the fact that the goal and effect of the statute is to shape the content of public discourse, because uncontroversial allocation criteria also have these characteristics. NEA grants distributed on the basis of artistic excellence have exactly the purpose and effect of shaping the content of public discourse. Nor can the intuition rest on the notion that government action seeking to reaffirm the political status quo is presumptively unconstitutional, for the speech of government officials often has precisely this purpose, particularly during reelection campaigns.

Perhaps, then, our intuition rests on some ground of difference between government speech and government grants to private persons. The grounds for distributing the latter, we might say, must be reasonable, by which we mean that they must be justifiable by reference to some common value. Grants to achieve artistic excellence are reasonable because as a culture we share commitments to the worth of artistic merit. Grants to support research in history or to support the performance of opera are rational because we recognize and accept the value of these endeavors.

But what value would underwrite our hypothetical statute? It may advance the interests of the party in power to receive federally funded artistic support, but that is not a shared value. We value instead the fairness of the political process as a whole, which we sharply distinguish from the particular interests or preferences of specific parties who participate in that process. We may even go further and observe that awarding grants to art supportive of the political party in power would impair the fundamental fairness of the political process. Such grants might be thought analogous to purchasing votes.

These conclusions suggest that our intuition about the unconstitutionality of the hypothetical statute does not stem from any generic commitment to the vigor and diversity of public discourse, as in the collectivist theory articulated in Red Lion, but rather from specific views about the distinct realm of partisan politics.181 No doubt this realm embraces far more than simple contretemps between Republicans and Democrats; its boundaries may even include disputes that are (so to speak) foregrounded or framed for decision by an electorate or legislature.182 We would certainly wish to place definite constitutional limitations on the power of government to dispense subsidies to intervene in such disputes, and we would probably express those limitations in terms of the distinction between preferences and values, and in terms of specifically political norms of fundamental fairness.

We can test this analysis by imagining a congressionally authorized prize to be awarded annually to the best "patriotic" work of art. Whatever we may ultimately conclude about the legitimacy of such a prize, it is fair to say that we would not strongly and immediately intuit that it should be

unconstitutional. A decision rule allocating government subsidies to patriotic art, even though supportive of the political status quo, is in every material respect analogous to a decision rule allocating government subsidies to excellent art. Both artistic excellence and patriotism transcend the specifically political, because neither can be said to be disputable in a manner framed for decision; both embody shared values, not preferences; and neither would violate fundamental norms of political fairness. If the NEA decency clause were measured by these standards, I suspect that it would easily pass muster. Decency is not a matter of partisan politics. It is a shared value, not a preference. And the value of decency is not only consistent with fundamental norms of political fairness, it is in some respects presupposed by public discourse itself.183

We can learn from our examination of the hypothetical statute, then, that there are discrete pockets of constitutional concern that establish limits to the decision rules that may be used to allocate government subsidies. This is useful to know, and if we were to engage in a thorough canvass of the subject we would wish to search out these pockets and identify them. But this insight does not advance our effort to derive a general standard from the collectivist theory of Red Lion that will enable us to assess the constitutionality of specific decision rules.

The most significant and sustained effort to accomplish this task is by Owen Fiss in his recent book The Irony of Free Speech.184 Fiss proposes a constitutional standard that would prohibit decision rules allocating government subsidies "in such a way as to impoverish public debate by systematically disfavoring views the public needs for self-governance."185 The question, of course, is how such unconstitutional decision rules can be identified, and to his credit, Fiss directly confronts this issue. In doing so, however, he is drawn in two incompatible directions, so that his analysis ultimately offers a lesson quite different from that which he intends.

In certain moods Fiss embraces an ideal of government neutrality, which he strives to realize by proposing criteria for assessing managerial purposes that are defined in purely procedural terms.186 He argues that the state ought to fund private speech based on its "relative degree of exclusion. ... Arguably, all unorthodox ideas have claim under the First Amendment to public funding, but perhaps those most unavailable to the public have the greatest claim."187 Fiss also contends that "financial need" ought to be an additional factor for constitutional consideration.188

The attraction of these procedural criteria is that they are content neutral. They depend upon an implicit egalitarian norm that would promote (something like) equal access for all ideas, and that would thus give extra assistance to ideas that are excluded because of their obscurity or lack of financial support. The source of this norm lies within the equal protection jurisprudence of which Fiss is an acknowledged master.189 But that jurisprudence carries within it certain important assumptions. It presumes, for example, that the norm of equality is to be applied to units-like individuals or groups-that are finite in number. It also presumes that there is a metric of equality, whether it be "educational opportunity" or "dignity," with respect to which each of these units should be regarded as the equal of every other.

These assumptions, however, are inapplicable in the context of ideas. The number of potential ideas is infinite, not finite. This implies that a

principle aspiring to provide equal access to all ideas is impossible either to conceive or to apply. Moreover, there is no common metric-whether it be called "opportunity for public discussion" or "intrinsic worth"-with respect to which each of these infinite ideas should be regarded as equal to every other. Many ideas that are "unavailable" for public consideration are excluded because they are long dead or decisively repudiated. No one would now take seriously ideas of human sacrifice, or phlogiston, or the droit du seigneur, and so forth, ad infinitum. When the government creates decision rules to allocate subsidies for speech, it need not and should not be under a constitutional obligation to resuscitate and subsidize each of these ideas merely because they are without financial support, excluded, or otherwise "unavailable to the public."

Meiklejohn was therefore quite incorrect to claim that there is an "equality of status in the field of ideas."190 There is instead a constitutional equality of status among persons who propound ideas.191 Because we believe in an equality of status among speakers, we do not permit the state to regulate public discourse so as to favor the contributions of some persons more than others, even if the state believes that the ideas of some are worthier of public attention or space on the public agenda.192 But because we do not believe in an equality of status among ideas, we permit the government to advance and accentuate discrete and specific ideas when it itself speaks.193

Fiss is keenly aware of this difficulty, and he is consequently also drawn to content-based criteria for the constitutional assessment of decision rules for government subsidies. He believes that the First Amendment should require government officials affirmatively "to ensure the fullness and richness of public debate,"194 and hence to make decisions "analogous to the judgments made by the great teachers of the universities of this nation every day of the week as they structure discussion in their classes."195 Fiss fully recognizes that to fulfill this goal would require "a sense of the public agenda, a grasp of the issues that are now before the public and what might plausibly be brought before it, and then an appraisal of the state of public discourse."196

Fiss's proposal to evaluate decision rules for their affirmative contribution to the fullness and richness of public debate is flatly inconsistent with his proposal to evaluate decision rules based upon viewpoint neutral criteria, like those underlying a mechanical egalitarianism. If the agenda of public discourse were fixed, one might (perhaps) imagine a viewpoint neutral rule mandating ventilation of all sides of existing issues. But of course the agenda of public discourse is fiercely contested and controversial. Indeed, "(p)olitical conflict is not like an intercollegiate debate in which the opponents agree in advance on the definition of the issues.... He who determines what politics is about runs the country, because the definition of the alternatives is the choice of conflicts, and the choice of conflicts allocates power."197 To impose on government officials a constitutional duty to allocate subsidies based upon their sense of a proper public agenda is therefore to require them to adopt particular persnectives within intensely contested controversies.

This is not fatal, however, for we have already seen that decision rules are often and appropriately viewpoint-based. In fact, a constitutional standard mandating that decision rules for the allocation of subsidies be evaluated according to their effect on ensuring the quality of public discourse seems to me theoretically and constitutionally attractive. The only question that it raises, and it is not an insignificant question, is how such an affirmative standard could institutionally be applied by courts. Decisions to disburse

subsidies are always made in the context of scarcity, and they are highly polycentric.198 Subsidies can be granted according to a virtually infinite set of possible criteria. Even if a given set of criteria is accepted, there are innumerable potential grantees and limitless permutations by which funds may be distributed among any particular set of grantees.

In such circumstances Fiss's proposed standard could not plausibly function as a set of determinate restrictions on government action; it would instead have to be conceived as an aspirational goal toward which government officials should aim. From the perspective of a reviewing court, therefore, the standard would require judicial evaluation of whether the goal could have been better achieved through a different set of allocation rules. As this will always be the case, the adoption of Fiss's proposed standard would lead either to substantial judicial preemption of, or substantial judicial deference to, decision rules for allocating subsidies.

Given these choices, it is readily predictable that courts will choose the latter option. They would be right to do so, for judicial preemption of the allocation criteria for government subsidies would itself operate as a significant disincentive to government investment in subsidies. Imagine, for example, what a court would actually do if the NEA budget were slashed to ten million dollars, and if Congress were to decide that the entire budget ought to be devoted to opera, or to museum outreach programs, or to innovative ballet companies, or to some combination of the three. No matter what selection Congress makes, it will always be possible for a court legitimately to reason that public discourse could have been made richer by a different choice. If courts were routinely to take advantage of this fact to alter congressional funding priorities for the NEA, it is unlikely that Congress would long continue to support the NEA.

Fiss seems to assume that, contrary to this analysis, he has created a standard that will operate as a determinate restriction on government decision rules. He writes that allocation criteria like "family values" would be facially unconstitutional because of their "pernicious effects on debate by simply reinforcing orthodoxy."199 But Fiss's reasoning in these passages relies on the mechanical, content-neutral norm of egalitarianism which I have argued must be abandoned as both theoretically and practically inadequate. Once the viewpoint discrimination entailed by Fiss's affirmative standard is firmly assimilated, it is not at all clear how a court could decide that the criterion of "family values" should be set aside as obviously unconstitutional. If Congress were to conclude that public debate would be enriched if greater attention were to be paid to the commonly shared values of the nuclear family-for example, by funding art on "children of divorce"-a court would have neither more nor less grounds on which to disagree than if Congress were to decide that the NEA ought to devote its entire (reduced) budget to opera.

The fact that family values are popular and commonly shared, or, in Fiss's demeaning term, "orthodox," would not be grounds for abandoning a posture of judicial deference because, as we have seen, these attributes are precisely what authenticate the government's support of family values as reasonable and legitimate. Allocation criteria that are idiosyncratic and without roots in a common culture would be vulnerable to the charge of arbitrariness. If a congressional statute were to mandate that the NEA award grants only to redheaded artists, a court might well move beyond deference to strike down the statute as irrational. But the court's ruling would actually depend upon its

perception that the statute could not be justified by reference to shared and "orthodox" values.

These considerations suggest that even if Fiss's proposed affirmative standard were accepted-and I think that it should be-courts could not and should not use it to set aside decision rules for allocating subsidies except in extreme and marginal cases.200 Subsidies that literally overwhelm public discourse, that seriously rupture foundational notions of a functioning marketplace of ideas, can and should be set aside. But these will, by definition, be highly exceptional circumstances. It is in fact most likely that courts will recognize such exceptional circumstances not by reference to the affirmative standard of a rich public discourse, but rather by the negative criterion that Mark Yudof long ago articulated, which identifies the fear that government decision rules will operate "to falsify consent" by fashioning "a majority will through uncontrolled indoctrination activities."201 But whichever way the problem is analyzed-whether from the perspective of a public discourse that is insufficiently rich or from one that is artificially narrow-the NEA decency clause does not appear to constitute the kind of rare and exceptional case that would or should be found unconstitutional.202

D. The NEA Controversy Revisited: The Conflict Between Democratic SelfGovernance and Community Self-Definition

It seems, then, that we are faced with the unpalatable choice of either placing the NEA in a constitutional straitjacket or else liberating it to engage in a wide range of content-based interventions-interventions that many of us may find both misguided and offensive. We do not appear to have the option of picking and choosing, of constitutionally constraining the NEA to decision rules that we happen to find amenable or of constitutionally empowering the NEA to promulgate conduct rules that we happen to find wise.

It is worth pausing for a moment to reflect upon why we must choose between these unattractive options. "The fault," as Shakespeare might have remarked, "is not in our stars, (b)ut in ourselves."203 It is precisely because we wish to use the First Amendment to establish a realm of public discourse in which persons are regarded as autonomous and self-determining that we impose strict constitutional requirements of neutrality on state regulation of public discourse. And it is precisely because we wish our government to exemplify and to advance the particular norms of our community that we relax these requirements when the state is acting on its own account to support the nation's arts.

We face, in other words, a conflict between two constitutional values: that of democratic self-governance and that of community self-definition.204 It is the function of constitutional law systematically to describe the internal architecture of values like these, to embody that architecture in social space, to articulate its practical ramifications, and, in cases of conflict between values, to adjudicate their proper boundaries.205 To characterize the decency clause as a decision rule or as a conduct rule is, in effect, to fix the boundary between two constitutional values.206

Where we set that boundary will depend in part upon the manner in which the decency clause affects the production of art within the public discourse enveloping the NEA. We would be more likely to classify the clause as a conduct rule, and hence to subject it to the constraints of a constitutional regime of

democratic self-governance, if we were to regard the clause as imposing community norms on public discourse. Conversely, we would be more likely to classify the clause as a decision rule-and hence to be constitutionally legitimized, if we were to view the clause as merely encouraging a shared and important community value.

A brief review of the evidence suggests an ambiguous picture. Unlike section 399 in League of Women Voters, the decency clause does not prohibit behavior; it merely regulates the availability of subsidies. Although the NEA is a relatively new organization, some artists may have begun to feel entitled to its subsidies; but this sense of entitlement does not seem to be shared by the general public.207 Although the NEA is an important and influential player in the world of art production, the actual extent of this world's practical dependence on the NEA is uncertain.208

To this equivocal evidence must be added one further consideration: The constitutional consequences of characterizing the decency clause as a conduct rule are dramatically disabling. Such a characterization would impose on the NEA crippling requirements of content neutrality, requirements that would provide strong disincentives for congressional support. Because I set a high value on encouraging and empowering the government to establish institutions designed to further norms like artistic excellence, I would myself lean toward giving ample scope to the value of community self-definition in the context of NEA subsidies, and I would therefore be quite cautious in characterizing the decency clause as a conduct rule.

It is not my intention, however, to press these preliminary observations toward definitive conclusions. My point is instead to stress that a full understanding of the legal dimensions of the NEA controversy will require a strong grasp of the importance and implications of the characterization of government action. Whether courts ultimately come to regard the NEA decency clause as a conduct rule or as a decision rule, their decision ought to be informed by a comprehension of the constitutional significance and consequences of this characterization.

IV. CONCLUSION

At the beginning of this Essay, I observed that the doctrines of unconstitutional conditions and viewpoint discrimination are incoherent because they are excessively abstract and formal, detached from the actual levers of decision. We can now summarize the jurisprudential causes of this observation.

First Amendment rights of freedom of expression are methods of structuring legal interventions that define and enforce the consequences of constitutional values. Because these values are particular to specific social domains, so are First Amendment rights.209 The doctrines of unconstitutional conditions and viewpoint discrimination, however, purport to apply universally, to control all aspects of social space. When courts are asked to employ the doctrines in situations where the doctrines do not correspond to relevant constitutional values, courts must deform and evade the doctrines, twisting them into ever more confused, arbitrary, and irrelevant shapes.

To rehabilitate First Amendment doctrine means to fashion it to address the actual values that move our constitutional decisionmaking. Even then doctrine may not compel specific outcomes in particular cases. What we have a right to

expect from doctrine is that it force us to confront and to clarify the constitutional values that matter to us. My ambition in this Essay is to have articulated in cases of subsidized speech two doctrinal inquiries that seem to me useful in this way. The first involves the characterization of speech, and it requires us to determine the domain to which the subsidized speech at issue in a particular case should be assigned. We must decide whether to classify subsidized speech as within public discourse or as within some other domain like that of management or professional speech. As we locate subsidized speech in social space, so we identify the constitutional value that we attach to the speech and the concomitant set of constitutional constraints that we will apply to its regulation.

The second inquiry involves the characterization of government action, and it requires us to determine whether the standards allocating government subsidies should be understood as regulations of subsidized speech or instead as internal directives to state officials dispensing subsidies. If we classify the standards as regulations, we shall subject them to the full array of constitutional constraints required by the domain in which the subsidized speech is located. But if we instead regard the standards as internal directives, we shall cede to the government a far freer hand in exemplifying and advancing national values.

Footnote:

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1. Stromberg v. California, 283 U.S. 359, 369 (1931).

2. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

3. Brown v. Hartlage, 456 U.S. 45, 60 (1982).

4. Steven Shiffrin, in Government Speech, 27 UCLA L. REV. 565, 569-70 (1980), credits Laurence Tribe and Mark Yudof for most prominently noting this proposition. See also Laurence Tribe, Toward a Metatheory of Free Speech, 10 Sw. U. L. REv. 237, 244-5 (1978); Mark Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 TEX. L. REV. 863 (1979).

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5. I do not, of course, mean to imply that these two questions of social characterization exhaust the constitutional issues that can be posed by cases of subsidized speech. I mean only to claim that such cases will, at a minimum, require a response to these two questions.

6. For a general discussion, see Robert Post, Recuperating First Amendment Doctrine, 47 STAN. L. REV. 1249 (1995).

7. William T. Mayton, "Buying-Up Speech": Active Government and the Terms of the First and Fourteenth Amendments, 3 WM. & MARY BILL RTS. J. 373, 376 (1994); see David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. REV. 675, 682 (1992); Martin H. Redish & Daryl I. Kessler, Government Subsidies and Free Expression, 80 MINN. L. REV. 543, 54445 (1995); Michael J. Elston, Note, Artists and Unconstitutional Conditions: The Big Bad Wolf Won't Subsidize Little Red Riding Hood's Indecent Art, LAW & CONTEMP. PROBS., Summer 1993, at 327, 333, 341-42, 358; Gary Feinerman, Note, Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection, 43 STAN. L. REV. 1369, 1378 (1991); Michael Fitzpatrick, Note, Rust Corrodes: The First Amendment Implications of Rust v. Sullivan, 45 STAN. L. REV. 185, 196 (1992). See generally RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 183 (1992).

8. 468 U.S. 364 (1984).

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9. See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 6-10 (1995).

10. 115 S. Ct. 2510 (1995).

II. 500 U.S. 173 (1991).

12. See POST, supra note 9, at 4-6.

13. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969).

14. For a full discussion, see POST, supra note 9, at 188-89, 280-82. The public/private distinction, of course, bears many different kinds of meanings, only one of which I am exploring here.

15. See Robert Post, Between Democracy and Community: The Legal Constitution of Social Form, 35 NOMOS 163 (John W. Chapman & Ian Shapiro eds., 1993).

16. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988).

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17. See Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. COLO. L. REv. 1109, 1128-33 (1993).

18. See id. at II 111-19.

19. See Post, supra note 6, at 1277.

20. On the boundaries of public discourse, see Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 667-84 (1990).

21. On the highly contextualized nature of such judgments, see id.

22. 115 S. Ct. 2510 (1995).

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23. Id. at 2518-19 (citations omitted).

24. Id. at 2518; see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 12-4, at 807-OS (2d ed. 1988); Cole, supra note 7, at 702-04 (enumerating justifications for government-supported speech). But cf. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 106-07 (1995). I defer to Part III the question of whether the First Amendment places any constraints on government expression of such viewpoints.

25. Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REv. 1413, 1415 (1989).

26. 408 U.S. 593 (1972).

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27. Id. at 597.

28. See Brooks R. Fudenberg, Unconstitutional Conditions and Greater Powers: A Separability Approach, 43 UCLA L. REV. 371, 388-93 (1995).

29. Sullivan, supra note 25, at 1415; see Lynn A. Baker, Conditional Federal Spending After Lopez, 95 COLUM. L. REV. 1911, 1921 (1995) (discussing indirect limitations of state powers under Tenth Amendment).

30. Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. PA. L. REV. 1293, 1359-74 (1984); Sullivan, supra note 25, at 1489.

31. Sullivan, supra note 25, at 1490.

32. Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. REv. 593, 620 (1990); see also William P. Marshall, Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses, 26 SAN DIEGO L. REV. 243, 244 (1989) (analyzing doctrine in relation to religion clauses).

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33. International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992).

34. Rust v. Sullivan, 500 U.S. 173, 199-200 (1991) (citations omitted).

35. See Hannegan v. Esquire, Inc., 327 U.S. 146, 151 (1946); see also Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (finding public campaign financing permissible subsidy); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 234-35 (1983) (listing examples of government speech subsidies).

36. See Speiser v. Randall, 357 U.S. 513, 518 (1958) (holding First Amendment limits Congress's power to regulate mail); see also United States v. Van Leeuwen, 397 U.S. 249, 251-52 (1970); Sherbert v. Verner, 374 U.S. 398, 404-OS (1963); Hannegan v. Esquire, Inc., 327 U.S. 146, 155-56 (1946); Tollett v. United States, 485 F.2d 1087, 1090 (8th Cir. 1973); O'Brien v. Leidinger, 452 F. Supp. 720, 725 (E.D. Va. 1978); United States v. Lethe, 312 F Supp. 421, 425-26 (E.D. Cal. 1970).

37. 461 U.S. 540, 549 (1983). Justice Rehnquist did observe that "(t)he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to "'ai(m) at the suppression of dangerous ideas."'' Id. at 548 (citations omitted). However, as the examples offered in the following paragraph in the text indicate, constitutional restraints on governmental use of subsidies to regulate speech in public discourse would apply to discrimination that is content-based as well as viewpoint-based.

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38. Cf. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (invalidating state prohibition of policy-oriented speech on monthly bills of public utilities).

39. For a good discussion of government participation in the system of freedom of expression, see CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114-21 (1973); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 697-716 (1970). On the extreme difficulty of these questions, see Shiffrin, supra note 4, at 572-605; Yudof, supra note 4, at 871-72. The obvious differences between the speech of private persons and the speech of the state have recently featured prominently with respect to the Court's Establishment Clause jurisprudence, which has tended to stress, as Justice O'Connor has put it, the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990); see also Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2522 (1995) (applying Mergens distinction).

40. First Amendment Implications of the Rust v. Sullivan Decision: Hearing on First Amendment Implications of the Rust v. Sullivan Decision Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 102d Cong. 11 (1991) (hereinafter Hearings) (statement of Leslie H. Southwick, Deputy Ass't Att'y Gen., Civil Div., U.S. Dep't of Justice).

41. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (holding acts of privately operated school whose income is derived primarily from public sources are not state action); Polk County v. Dodson, 454 U.S. 312 (1981) (holding that public defender's actions do not constitute state action).

42. 395 U.S. 367 (1969).

43. See FCC v. National Citizens' Comm. for Broad., 436 U.S. 775, 800 (1978).

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44. Red Lion, 395 U.S. at 388.

45. Id. at 394.

46. Id. at 389.

47. See id. at 389-90.

48. Id. at 390.

49. 412 U.S. 94 (1973).

50. Such an outcome, Chief Justice Burger noted, would subordinate "(j)ournalistic discretion" to "the rigid limitations that the First Amendment imposes on Government." Id. at 121. Other Justices noted that it would convert broadcasters into "common carriers" and "thus produce a result wholly inimical to the broadcasters' own First Amendment rights." Id. at 140 (Stewart, J., concurring); see also id. at 149-65 (Douglas, J., concurring). Justices White, Powell, and Blackmun did not reach the question of state action. See id. at 146-48. Justices Brennan and Marshall would have found that the public nature of the airwaves, the governmentally created preferred status of broadcast licensees, the pervasive federal regulation of broadcast programming, and the Commission's specific approval of the challenged broadcaster policy combine in this case to bring the promulgation and enforcement of that policy within the orbit of constitutional imperatives. Id. at 173 (Brennan, J., dissenting).

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51. Id. at 120.

52. CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973)); see also City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

53. CBS, Inc. v. FCC, 453 U.S. 367, 397 (1981); see also id. at 396.

54. See, e.g., Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); cf Herbert v. Lando, 441 U.S. 153 (1979) (analyzing proposed privilege under substantive First Amendment doctrine).

55. 468 U.S. 364 (1984).

56. Id. at 366.

57. Id. at 416 (Stevens, J., dissenting); see also FCC v. National Citizens' Comm. for Broad., 436 U.S. 775, 801-02 (1978).

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58. League of Women Voters, 468 U.S. at 378 (citations omitted). Brennan's position represents an impli

cit reversal of his earlier opinion in CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973).

59. League of Women Voters, 468 U.S. at 382 (citation omitted).

60. Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

61. See 412 U.S. at 149-50 (Douglas, J., concurring).

62. See id. (Douglas, J., concurring).

63. League of Women Voters, 468 U.S. at 388-89.

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64. Id. at 389.

65. Id. at 394. For a good discussion of the success of this insulation, see YUDOF, supra note 35, at 124-35.

66. For a cross-cultural perspective on this characterization, see MONROE E. PRICE, TELEVISION: THE PUBLIC SPHERE AND NATIONAL IDENTITY 35 (1995).

67. League of Women Voters, 468 U.S. at 392.

68. See id. at 384.

69. See id. at 392-93.

70. Id. at 396.

71. See id at 391, 396.

72. Id. at 395.

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73. Id. at 403 (Rehnquist, J., dissenting).

74. 461 U.S. 540 (1983).

75. League of Women Voters, 468 U.S. at 405.

76. See supra notes 35-38 and accompanying text; cf Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592-93 (1983) (holding that use tax on ink and paper targeting small group of newspapers "places a heavy burden on the State to justify its action"). Strict scrutiny would occur "even where . . . there is no evidence of an improper censorial motive." Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987).

77. In the case of broadcasters, for example, the rationale of scarcity, upon which the Court has repeatedly relied, is now surely no more than a fiction. See LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 200-09 (1987). Even the Court has itself come close to admitting this. See Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2457 (1994); League of Women Voters, 468 U.S. at 376 n. 1 1. This implies that the actual rationale for characterizing broadcasters as public trustees has not yet been articulated by the Court.

78. See Post, supra note 20, at 667-84.

79. Although the scarcity rationale presents itself as a simple empirical fact, that fact cannot, even if true, itself explain the special quasi-public status conferred on broadcasters. All that follows from scarcity is that the state must find some allocation rule to distribute scarce broadcast frequencies. One possible allocation would be to sell frequencies on the open market, just as the government sells scarce state-owned land. The owners of frequencies would then be regarded as purely private speakers. Such a scenario is surely possible, which indicates that its rejection must turn on normative considerations rather than on the bare fact of scarcity.

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80. See, e.g., Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. REV. 1713 (1987).

81. See POST, supra note 9, at 4-6, 10-15.

82. See Post, supra note 80, at 1767-75.

83. See Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 WM. & MARY L. REV. 267, 318 (1990) (analyzing instrumental regulation of speech within universities).

84. See Robert C. Post, The Management of Speech: Discretion and Rights, 1984 SuP. CT. REV. 169, 201-06 (analyzing instrumental regulation of speech within court system).

85. See Brown v. Glines, 444 U.S. 348, 354 (1980).

86. Connick v. Myers, 461 U.S. 138, 142 (1983) (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)); see Post, supra note 80, at 1814 n.351.

87. For a more detailed analysis of the management of speech within government institutions, see Post, supra note 80, at 1767-84.

88. For a theoretical discussion of viewpoint discrimination in nonpublic forums, see id. at 1824-32.

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89. See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2147-48 (1993); Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983); SMOLLA, supra note 7, at 184.

90. 115 S. Ct. 2510 (1995).

91. Id. at 2519.

92. Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981); cf. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school.") (citation omitted). For a fuller analysis of free speech within the university, see Post, supra note 83, at 317-25.

93. Rosenberger, 1 1S S. Ct. at 2516-17.

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94. Id. at 2517.

95. See Paul B. Stephan III, The First Amendment and Content Discrimination, 68 VA. L. REV. 203, 218 (1982); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 197-200 (1983); Luba L. Shur, Note, Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest, 81 VA. L. REV. 1665, 1692 (1995).

96. Rosenberger, I IS S. Ct. at 2517. The difference between viewpoint and content discrimination is, in Justice Kennedy's account, intrinsically unstable and therefore always potentially arbitrary. References to religious speech may refer to either content or viewpoint discrimination, depending upon the circumstances that are deemed salient. In the context, say, of a course on the history of religious thought, the category of "religious speech" may refer merely to the meaning of speech. But in the context of a dispute between advocates of evolution and partisans of creationism, the category may refer to a particular viewpoint. It is not the category of religious speech that is determinative, therefore, but the social situation in which the category is deployed. As Elena Kagan rightly observes:

> The very notion of viewpoint discrimination rests on a background understanding of a disputed issue. If one sees no dispute, one will see no viewpoints, and correspondingly one will see no viewpoint discrimination in any action the government takes. Similarly, how one defines a dispute will have an effect on whether one sees a government action as viewpoint discriminatory.

Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 SuP. CT. REV. 29, 70 (footnote omitted). The problem with Justice Kennedy's opinion is that he does not explain how to characterize the social situation in which a regulation is to be categorized as either viewpoint-based or content-based.

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97. There is some language in the opinion that suggests the Court might also have had in mind that the student speech supported by the grants was part of public discourse and that the grant program was therefore not part of the managerial operation of the University. The Court refers repeatedly to the "distinction between the University's own favored message and the private speech of students." Rosenberger, 115 S. Ct. at 2519. But this characterization of the grant program is contrary to the University's own assertion that the grants were designed "to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University."' Id. at 2514 (citation omitted). In fact, the University of Virginia would have a good deal of explaining to do to the taxpayers of the state were its program not fashioned to further the University's actual educational relationship with its students.

A more plausible explanation of the Court's underlying logic, therefore, is that the Court interpreted the actual justification for the University's

exclusion of religious speech to rest on the University's desire to avoid violating the Establishment Clause. The Court's holding that the Establishment Clause would not be violated by grants subsidizing religious speech removed this rationale, see id. at 2420-24, leaving the exclusion without managerial justification and hence vulnerable to characterization as viewpoint discrimination.

98. I have sketched the outlines of such an analysis elsewhere. See Post, supra note 83, at 317-25.

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99. Fitzpatrick, supra note 7, at 185.

100. 500 U.S. 173 (1991).

101. See Hearings, supra note 40.

102. See Cole, supra note 7, at 684 n.34.

103. For a sample of academic commentary critical of the Rust decision, see SMOLLA, supra note 7, at 218-19; Cole, supra note 7; Phillip J. Cooper, Rusty Pipes: The Rust Decision and the Supreme Court's Free Flow Theory of the First Amendment, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359 (1992); Fitzpatrick, supra note 7; Stanley Ingber, Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue, 46 RuTGERs L. REV. 1473, 1579-1612 (1994); Ronald J. Krotoszynski, Jr., Brind & Rust v. Sullivan: Free Speech and the Limits of a Written Constitution, 22 FLA. ST. U. L. REv. 1 (1994); Thomas Wm. Mayo, Abortion and Speech: A Comment, 46 SMU L. REV. 309 (1992); Dorothy E. Roberts, Rust v. Sullivan and the Control of Knowledge, 61 GEO. WASH. L. REv. 587 (1993); Peter M. Shane, The Rust That Corrodes: State Action, Free Speech, and Responsibility, 52 LA. L. REv. 1585 (1992); Christina E. Wells, Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724 (1995); Loye M. Barton, Note, The Policy Against Federal Funding for Abortions Extends into the Realm of Free Speech After Rust v. Sullivan, 19 PEPP. L. REV. 637 (1992); Ann Brewster Weeks, Note, The Pregnant Silence: Rust v. Sullivan, Abortion Rights, and Publicly Funded Speech, 70 N.C. L. REV. 1623 (1992). But see William W. Van Alstyne, Second Thoughts on Rust v. Sullivan and the First Amendment, 9 CONST. COMMENTARY 5 (1992).

104. Rust, 500 U.S. at 178 (quoting 42 U.S.C. 300a-6 (1991)).

105. Id. at 179 (quoting Grants for Family Planning Services, 42 C.FR. 59.8(a)(1) (1989)).

106. Id. at 180 (quoting Grants for Family Planning Services, 42 C.F.R. 59.10(a) (1989)). The regulations were suspended at the direction of President Bill Clinton in 1993. Clinton observed that the regulations "endanger() women's lives and health by preventing them from receiving complete and accurate medical information and interfere() with the doctor-patient relationship by prohibiting information that

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medical professionals are otherwise ethically and legally required to provide to their patients." William J. Clinton, President's Memorandum on the Title X "Gag Rule," 1993 PUB. PAPERS 10 (Jan. 22, 1993).

107. Rust, 500 U.S. at 196.

108. Id. at 197.

109. Id. at 193; see also id. at 195 n.4 ("The regulations are designed to ensure compliance with the prohibition of 1008 that none of the funds appropriated under Title X be used in a program where abortion is a method of family planning.").

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110. Id. at 192 (quoting Brief for Petitioners at II, Rust v. Sullivan, 500 U.S. 173 (1991) (No. 891391)). This was also the basis of much criticism of Rust. See, e.g., Hearings, supra note 40, at 19 (statement of Lee C. Bollinger) ("It is one of the most deeply held principles of the First Amendment that the government not discriminate on the basis of viewpoint, and that is what the regulation at issue in Rust v. Sullivan does."); see also Weeks, supra note 103, at 165862 (condemning Rust for viewpoint discrimination).

111. Rust, 500 U.S. at 194.

112. See Cole, supra note 7, at 688 n.47; Wells, supra note 103, at 1730-32; Weeks, supra note 103, at 1661-62.

113. See supra Section I.A.

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114. For arguments that they are not, see Redish & Kessler, supra note 7, at 576-77; Shane, supra note 103, at 1601-03. For the Court's argument to the contrary, see Rust, 500 U.S. at 192-93.

115. Post, supra note 80, at 1789 (footnote omitted). The argument of this and the following paragraph is fully developed in id. at 1788-809.

116. See id.

117. Leach v. Carlile, 258 U.S. 138, 141 (1922) (Holmes, J., dissenting).

118. United States ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

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119. See PETER M. BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS 62-63 (1962); see also ROY G. FRANCIS & ROBERT C. STONE, SERVICE AND PROCEDURE IN BUREAUCRACY 154-56 (1956) (discussing competing principles of bureaucracy and professionalism).

120. For a good discussion, see W. Richard Scott, Professionals in Bureaucracies-Areas of Conflict, in PROFESSIONALIZATION 265-75 (Howard M.

Vollmer & Donald L. Mills eds., 1966).

121. Id. at 266.

122. Polk County v. Dodson, 454 U.S. 312, 321 (1981) (citations omitted) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1976)).

123. West v. Atkins, 487 U.S. 42, 51 (1988).

124. "Medical ethics as well as medical practice dictate independent judgment . . . on the part of the doctor." Paul D. Rheingold, Products Liability-The Ethical Drug Manufacturer's Liability, 18 RUTGERS L.J. 947, 987 (1964); cf FRANCIS & STONE, supra note 119, at 156 (arguing that in professional mode of

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organization highly skilled professionals must be responsible for their decisions and able to perform on their own).

125. Lurch v. United States, 719 F.2d 333, 337 (10th Cir. 1983) (quoting PRINCIPLES OF MEDICAL ETHICS 6, reprinted in AMERICAN MED. ASS'N JUDICIAL COUNCIL, OPINIONS AND REPORTS 5 (1977)). The physician's duty to exercise independent judgment ultimately stems from the basic principle that "(t)he patient's welfare and best interests must be the physician's main concern.... The physician's obligations to the patient remain unchanged even though the patient-physician relationship may be affected by the health care delivery system or the patient's state." American College of Physicians Ethics Manual (3d ed.), reprinted in 117 ANNALS INTERNAL MED. 947, 948 (1992) (hereinafter Ethics Manual); see also Council on Ethical and Judicial Affairs, Am. Med. Ass'n, Ethical Issues in Managed Care, 273 JAMA 330, 331 (1995) ("The foundation of the patient-physician relationship is the trust that physicians are dedicated first and foremost to serving the needs of their patients.").

126. Quilico v. Kaplan, 749 F.2d 480, 484-85 (7th Cir. 1984); accord Ezekiel v. Michel, 66 F.3d 894, 902 (7th Cir.1995) ("(E)ach and every licensed physician . . must fulfill his ethical obligations to exercise independent judgment when providing treatment and patient care . .."); Lilly v. Fieldstone, 876 F.2d 857, 859 (10th Cir. 1989) ("It is uncontroverted that a physician must have discretion to care for a patient and may not surrender control over certain medical details."); Kelley v. Rossi, 481 N.E.2d 1340, 1343 (Mass. 1985) (affirming importance of physician discretion). Justice Holmes, with characteristic pith, stated the point in this way: "There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control or direction of his employer." Pearl v. West End St. Ry., 176 Mass. 177, 179 (1900).

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127. It is clear that there is a potential conflict between the HHS regulations and ethical medical practice. Doctors are under an "ethical duty to disclose relevant information about reproduction .... (T)he physician does have a duty to assure that the patient is offered information on the full range of options ....Ethics Manual, supra note 125, at 950. "A pregnant woman should be fully informed in a balanced manner about all options, including raising the child herself, placing the child for adoption, and abortion.... The

professional should make every effort to avoid introducing personal bias." AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS (ACOG), STATEMENT OF POLICY 2 (Jan. 1993); see ACOG, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 61 (1989); ACOG, STATEMENT OF POLICY: FURTHER ETHICAL CONSIDERATIONS IN INDUCED ABORTION 3 (Dec. 1977); COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AM. MED. ASS'N, CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS

8.08 (1994) ("The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.").

The Court's assertion that "the Title X program regulations do not significantly impinge upon the doctor-patient relationship," Rust v. Sullivan, 500 U.S. 173, 200 (1991), can properly be said to border on the "disingenuous." Cole, supra note 7, at 692; see Rust, 500 U.S. at 211 n.3 (Blackmun, J., dissenting). The Court supports its assertion on two grounds. It states, first, that the HHS regulations do not require "a doctor to represent as his own any opinion that he does not in fact hold." Rust, 500 U.S. at 200. While this may be true, the regulations do prevent doctors from offering information that may be medically relevant and necessary to disclose. The Court states, second, that the "doctor-patient relationship established by the Title X program (is not) sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." Id. This assertion, however, merely assumes what must be demonstrated, which is that the physician-patient relationship within a Title X clinic is so obviously

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subordinated to managerial imperatives that it no longer conforms to ordinary understandings of that relationship. Although such an alteration is certainly possible, it is also most unusual, and the Court offers no evidence to support its claim that it has occurred within Title X clinics. A modicum of social awareness would surely dictate a different conclusion. See Cole, supra note 7, at 692; Roberts, supra note 103, at 598-600.

128. That is not to say, of course, that the government would be barred from creating special clinics in which all concerned were clear that what appeared at first blush to be "physicians" were actually merely state employees, fully subject to an administrative direction competent to override good and ethically required medical practice. The First Amendment would not constitutionally prohibit such a scheme. What the First Amendment forbids is the attempt to hire what all concerned understand to be physicians and then to attempt to regulate their speech as though they were merely employees.

129. I realize that this distinction is a matter of degree, because good medical practice often requires the provision of information. As used in this Essay, however, the distinction goes primarily to the justification for government regulation.

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130. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 COLUM. L. REV. 334, 355-59 (1991); Wells, supra note 103, at 1764 ("If the First Amendment stands for anything, it stands for

the principle that the government cannot 'deliberately deny() information to people for the purpose of influencing their behavior."' (quoting Strauss, supra, at 355)); see also 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1507-08, 1510-14 (1996) (plurality opinion).

131. See Paula Berg, Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice, 74 B.U. L. REv. 201 (1994); Robert D. Goldstein, Reading Casey: Structuring the Woman's Decisionmaking Process, 4 WM. & MARY BILL RTS. J. 787, 852-74 (1996).

132. Nor did the government suggest any other justification for the Title X regulations. See Brief for Respondent, Rust v. Sullivan, 500 U.S. 173 (1991) (No. 89-1391).

133. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

134. The Court in Rust repeatedly refers to Maher u Roe, 432 U.S. 464 (1977), as standing for the proposition that the state can choose to subsidize "services related to childbirth" but not "nontherapeutic abortions," because "the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds."' Rust, 500 U.S. at 192-93 (quoting Maher, 432 U.S. at 474 (omission in original)). The argument in this Essay is not inconsistent with this proposition; it merely requires us to make the distinction between government decisions refusing to fund the medical practice of abortion, because childbirth is viewed as a positive good, and government decisions

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precluding the dissemination of information about abortion, because abortion is viewed as a positive harm. For an interesting discussion of abortion as a "vice," see Wells, supra note 103, at 1758-62.

135. For a sample of the literature discussing the NEA controversy, see Cole, supra note 7, at 73943 (arguing that NEA funding restrictions undermine First Amendment); Elizabeth E. DeGrazia, In Search of Artistic Excellence: Structural Reform of the National Endowment for the Arts, 12 CARDOZO ARTS & ENT. L.J. 133 (1994) (suggesting structural reforms to grantmaking authority of NEA); Owen M. Fiss, State Activism and State Censorship, 100 YALE L.J. 2087 (1991) (analyzing exercise of state power in context of Mapplethorpe controversy and NEA); John E. Frohnmayer, Giving Offense, 29 GONZ. L. REV. I (1993-94) (discussing NEA controversy); Jesse Helms, Tax-Paid Obscenity, 14. NOVA L. REV. 317 (1990) (same); Robert M. O'Neil, Artistic Freedom and Academic Freedom, LAW & CONTEMP. PROBS., Summer 1990, at 177 (criticizing NEA funding restrictions as violation of freedom of expression); Amy Sabrin, Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?, 102 YALE L.J. 1209 (1993) (analyzing meaning of "content" in context of NEA controversy); Lionel S. Sobel, First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist, 41 VAND. L. REV. 517 (1988) (arguing that First Amendment imposes standards by which courts may evaluate constitutionality of government subsidies of cultural and artistic expression); Sunstein, supra note 32, at 610-15 (analyzing First Amendment implications of government funding of arts); MaryEllen Kresse, Comment, Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe Controversy"?, 39 BuFF. L. REV. 231 (1991) (analyzing

Mapplethorpe controversy); George S. Nahitchevansky, Note, Free Speech and Government Funding: Does the Government Have to Fund What It Doesn't Like, 56 BROOK. L. REV. 213 (1990) (arguing that funding decisions should be accorded higher standard of review as their restrictive effect increases); cf Alvara Ignacio Anillo, Note, The National Endowment for the Humanities: Control of Funding Versus Academic Freedom, 45 VAND. L. REv. 455 (1992) (discussing similar issues surrounding National Endowment for the Humanities grants to scholars).

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136. 20 U.S.C. 953(b) (1994).

137. Id. 954(c).

138. Id. 954(d).

139. Note, Standards for Federal Funding of the Arts: Free Expression and Political Control, 103 HARV. L. REV. 1969, 1972 (1990).

140. Fiss, supra note 135, at 2094. For a good description, see DeGrazia, supra note 135, at 139-41.

141. In 1989, Congress passed a temporary restriction on grants funded during fiscal year 1990, providing that grants could not be extended to support work "which in the judgment of the National Endowment for the Arts . . . may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." Act of Oct. 23, 1989, Pub. L. No. 101-121, 304(a), 103 Stat. 701, 741 (1990). The certification procedure used by the NEA to enforce the restrictions of this section was declared unconstitutional in Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991).

142. 20 U.S.C. 954(d)(1) (1994). The statute also declared that "obscenity is without artistic merit, is not protected speech, and shall not be funded." Id. 954(d)(2). For a good history of these events, see John H. Garvey, Black and White Images, LAW & CONTEMP. PROBS., Autumn 1993, at 189 (1993). In this Essay I do not examine the restrictions on NEA granting authority imposed by 954(d)(2).

143. 795 F. Supp. 1457 (C.D. Cal. 1992). An appeal of Finley is still pending.

144. Id. at 1476.

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145. See Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338, 2345 (1995); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

146. To paraphrase Laurence Tribe, it is not clear whether the decency clause is an instance of the government's adding its own voice or whether it is an example of the state's silencing the voices of others. See TRIBE, supra note 24, at 807.

147. JEFFREY PFEFFER & GERALD R. SALANCIK, THE EXTERNAL CONTROL OF ORGANIZATIONS 32 (1978).

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148. See Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 HARV. L. REV. 625 (1984). Kathleen Sullivan uses the vocabulary of "sovereign regulator" and "private art patron" to capture this distinction. See Kathleen M. Sullivan, Artistic Freedom, Public Funding, and the Constitution, in PUBLIC MONEY AND THE MUSE: ESSAYS ON GOVERNMENT FUNDING FOR THE ARTS 80, 82 (Stephen Benedict ed., 1991).

149. Cf. Milton C. Cummings, Jr., To Change a Nation's Cultural Policy: The Kennedy Administration and the Arts in the United States, 1961-1963, in PUBLIC POLICY AND THE ARTS 141, 141 (Kevin V. Mulcahy & C. Richard Swaim eds.,1982) (claiming that second-class postal rate was "profoundly important for" and "a major cause of' growth of American magazines).

150. Fiss, supra note 135, at 2097.

151. 20 U.S.C. 76j (1994); see Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 238 (1987) (Scalia, J., dissenting).

152. This would be true even if the restrictions would in a particular case have the effect of making "work unavailable to the general . . . public." Fiss, supra note 135, at 2097. The decisive question would be the effect of the restrictions on the relevant aspects of public discourse, not on particular speakers.

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153. Kreimer, supra note 30, at 1351-74.

154. See id. at 1359-63.

155. Sullivan, supra note 25, at 1490.

156. Finley v. NEA, 795 F. Supp. 1457, 1475 (N.D. Cal. 1992). For a similar perspective on the restrictions on NEA grants imposed by the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 304(a), 103 Stat. 701, 741 (1989), see Carl F. Stychin. Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment for the Arts, 12 CARDOZO ARTs & ENT. L.J. 79, 128-31 (1994).

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157. Mahler v. Eby, 264 U.S. 32, 41 (1924). For a good discussion of the vagueness doctrine in the context of decision rules, see Edward L. Rubin, Law and Legislation in the Administrative State, 89 COLUM. L. REV. 369, 397-408 (1989).

158. 47 U.S.C. 307(a) (1994). For the Supreme Court's unsympathetic response to the charge that the standard is unconstitutionally vague, see NBC v. United States, 319 U.S. 190, 225-26 (1943); FCC v. Pottsville Broad. Co., 309 U.S. 134, 137-38 (1940); see also Red Lion Broad. Co. v. FCC, 395 U.S. 367, 379-80

(1969) (discussing statutory authority of FCC to promulgate regulations).

159. See Finley, 795 F. Supp. at 1475-76.

160. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

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161. A central principle of First Amendment jurisprudence is that public discourse cannot be regulated in ways that censor speech to enforce community standards. See POST, supra note 9, at 134-96. It is because of this principle that a conduct rule imposing a "decency" standard would be found unconstitutional. But this principle would also require that a conduct rule imposing an "excellence" standard be found unconstitutional.

162. Finley, 795 F. Supp. at 1475; see YUDOF, supra note 35, at 234-35. The Court in Finley ineffectually tries to escape this conclusion by analogizing "funding for the arts to funding of public universities." Finley, 795 F. Supp. at 1475. The court reasoned that: In both settings, limited public funds are allocated to support expressive activities, and some content-based decisions are unavoidable.... Hiring and promotion decisions based on professional evaluations of academic merit are permissible in a public university setting, but decisions based on vague criteria or intended to suppress unpopular expression are not. Analogously, professional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of "decency" are not.

Id. (citations omitted). Even if we put to one side the court's strange notion that a criterion of "decency" is "wholly subjective" in ways that a criterion of "artistic excellence" is not, the court's attempt to equate the NEA with a public university is fundamentally incompatible with its desire to characterize and assess the decency clause as a conduct rule addressed to public discourse. This is because public universities are managerial domains dedicated to the purpose of education, see supra Section I.A, which is why universities may regulate speech in a "content-based" manner designed to accomplish heuristic purposes.

163. See YUDOF, supra note 35, at 24243. In light of this conclusion it is fascinating to note that with respect to both public fora and the United States mail, where allocation rules for government subsidies are unproblematically characterized as conduct rules, it is neither practically nor politically feasible for the government to withdraw its subsidies.

164. Government efforts to intervene in public discourse can of course infringe upon many different constitutional provisions. Such efforts, for example, may violate the Establishment Clause or the Equal Protection Clause. They may be arbitrary and irrational and thus run afoul of the Constitution's hostility to "naked preferences." See Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689 (1984). In this Essay, I consider only those restrictions that would be specifically placed on the decency clause, viewed as a decision rule, by the freedom of speech provisions of the First Amendment.

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165. The Supreme Court has explicitly drawn an analogous conclusion in the area of the dormant Commerce Clause, holding that the government may aim at certain purposes when it acts as a "market participant" that are prohibited to it when acting as a "market regulator." See Reeves, Inc. v. Stake, 447 U.S. 429, 436-40 (1980).

166. Thus a state which permitted "music, opera, drama, dance, and other performing arts" to be performed in a park that was a public forum could not simultaneously exclude academic or political speech.

167. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247-48 (1974) (footnote omitted). 168. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); see Metro Broad., Inc. v. FCC, 497 U.S. 547, 566 (1990) (endorsing FCC regulation aimed at increasing broadcast diversity), overruled in part by Adarand Constructors Co. v. Pena, 115 S. Ct. 2097, 2111 (1995). 169. A contrary conclusion would prohibit most constructive interventions by an activist state. See generally CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 230 (1993).

170. See Post, supra note 17, at I4-23.

171. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2519 (1995); Sanford Levinson, They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society, 70 CHI.-KENT L. REV. 1079 (1995) (arguing that state inevitably supports public symbols that carry particular ideological messages).

172. As Melville Nimmer once observed, "Surely there is something fundamentally wrong with a doctrine that would find presumptively illegitimate Theodore Roosevelt's view of the presidency as a 'bully pulpit,' and Franklin Roosevelt's exercise of leadership via the 'fireside chat.' Our government officials are properly expected to lead as well as to reflect public opinion." MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH, 4.09(D), at 4-96-97 (1984).

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173. Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983).

174. See, e.g., EMERSON, supra note 39, at 698 (recognizing necessity of government expression); Cole, supra note 7, at 702-03 (emphasizing importance of government freedom to control content of its speech); Donald W. Hawthorne, Subversive Subsidization: How NEA Art Funding Abridges Private Speech, 40 U. KAN. L. REV. 437, 451 (1992) (recognizing government's nonneutral promotion of ideas); Redish & Kessler, supra note 7, at 560-62 (expressing importance of government's role as educator and communicator).

175. Needless to say, traditional academic opinion is strongly to the contrary. See, e.g., SMOLLA, supra note 7, at 196 (characterizing straightforward viewpoint discrimination as constitutionally invalid); O'Neil, supra note 135, at 191 (same); Sobel, supra note 135, at 525 (same); Sullivan, supra note 148, at 89-90 (same); Sunstein, supra note 32, at 611-12 (same). But see SUNSTEIN, supra note 169, at 231-32 (setting out permissible parameters of viewpoint discrimination).

176. For a discussion of the viewpoint discriminatory aspects of current NEA funding criteria, see PRICE, supra note 66, at 184-86; Daniel Shapiro, Free Speech and Art Subsidies, 14 LAW & PHIL. 329, 346-53 (1995).

177. See Post, supra note 17, at I14-23.

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178. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389-90 (1969).

179. For example, an FCC rule prohibiting broadcasters from covering the Whitewater scandal would surely be unconstitutional because its purpose and effect would be to restrict the marketplace of ideas, even if broadcasters' speech is not regarded as part of public discourse.

180. Martin Redish and Daryl Kessler acutely observe that subsidies are sometimes provided on the condition that a recipient refrain from speaking in ways that the recipient would, in the absence of the subsidy, be free and able to do. They refer to this phenomenon as "negative subsidies" and convincingly argue that such subsidies should be regarded with constitutional suspicion. Redish & Kessler, supra note 7, at 558-59; see SMOLLA, supra note 7, at 189 (arguing that "the more lax constitutional treatment given to the government when it participates in the speech market should not be extended to the government when it is in fact engaged in market regulation, under the pretext of mere participation"). Chief Justice Rehnquist's discussion of the unconstitutional conditions doctrine in Rust is in fact an attempt to reduce the doctrine to a prohibition of negative subsidies. See Rust v. Sullivan, 500 U.S. 173, 197 (1991); supra text accompanying notes 108-11.

In the vocabulary that I have proposed in this Essay, we can conceptualize negative subsidies as an effort to leverage decision rules into conduct rules, and we can conclude that they should therefore be evaluated according to the standards appropriate to conduct rules. The Court has imposed similar limitations on a state's ability to leverage market participation into market regulation in the context of the dormant Commerce Clause. For a review of these cases, see South-Central Timber Dev. v. Wunnicke, 467 U.S. 82, 94-99 (1984).

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181. See SUNSTEIN, supra note 169, at 231-32. Shiffrin, supra note 4, at 612-17, 622-32; Steven Shiffrin, Government Speech and the Falsification of Consent, 96 HARV. L. REv. 1745, 1750-51 (1983) (reviewing YUDOF, supra note 35).

182. For an interesting case study on the proper scope of official lobbying for public referenda, see Burt v. Blumenauer, 699 P.2d 168 (Or. 1985).

183. For further discussion of the preconditions of public discourse, see POST, supra note 9, at 135-48.

184. OWEN Fiss, THE IRONY OF FREE SPEECH (1996).

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185. Id. at 42.

186. See id. at 42-43. As Fiss notes:

The ideal of neutrality in the speech context not only requires that the state refrain from choosing among viewpoints, but also that it not structure public discourse in such a way as to favor one viewpoint over another. The state must act as a high-minded parliamentiarian, making certain that all viewpoints are fully and fairly heard. Fiss, supra note 135, at 2100.

187. Fiss, supra note 184, at 44.

188. Id.

189. Fiss refers specifically to this jurisprudence: "Just as some minority groups may be more disadvantaged than others, some unorthodox ideas may be more hidden from public view than others." Id. On the general tendency to import Equal Protection norms into First Amendment analysis, see Post, supra note 6, at 1267-70.

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190. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948).

191. See Post, supra note 83, at 290-91.

192. See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (invalidating state prohibition of policy-oriented speech on monthly bills of public utilities); Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam) ("(T)he concept that government may restrict the speech of some elements of our society in order to enhance the relative value of others is wholly foreign to the First Amendment

193. This objection would prove fatal even if Fiss's egalitarian criteria were interpreted to apply only to the ideas of persons participating within public discourse. Although the potential number of such ideas may not be infinite, Fiss could not defend this (modified) egalitarian thesis on the ground that a rich and full public debate requires subsidization of all views articulated within public discourse that happen to be underfinanced or generally unavailable. It could not plausibly be maintained that public debate would be richer if the views of Nazis or Stalinists were subsidized, even if such views were unorthodox, marginalized, and not commonly accepted. Surely it would be bizarre to contend that such views must be supported to ensure a better and more informed public dialogue. Nor could a modified egalitarian thesis be defended on the principle that the state ought to treat all persons within public discourse equally, as that principle would instead require the state to refrain from treating people differently, even if their ideas had different degrees of acceptance and exposure. The modified egalitarian thesis would therefore have to be justified by some variant of the notion that the First Amendment requires equality among ideas. But there is no particular reason to accept this proposed equality, and good reasons to reject it.

194. Fiss, supra note 184, at 41.

195. Fiss, supra note 135, at 2101.

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196. Id.; see Fiss, supra note 184, at 44-5.

197. E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST S VIEW OF DEMOCRACY IN AMERICA 68 (Ist ed. 1960). As William H. Riker concisely observes: "Just what is a political issue is itself a political issue." AGENDA FORMATION 3 (William H. Riker ed., 1993).

198. See Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 393-405 (1978) (discussing concept of polycentric tasks and adjudication).

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199. Fiss, supra notes. 184, at 37

200. Cf. YUDOF, supra note 35, at 259 (judicial review of government supported speech appropriate primarily in "egregious" cases); Frederick Schauer, Is Government Speech a Problem?, 35 STAN. L. REv. 373, 378 (1983) (reviewing YUDOF, supra note 35)

201. YUDOF, supra note 35, at 15.

202. Fiss does not in fact believe that the decency clause should be set aside as unconstitutional. See FISS, supra note 184, at 38.

203. WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2.

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204. On the fundamental constitutional value of community self-definition, see POST, supra note 9, at 1-18, 51-88, 177-96.

205. We are, of course, free to alter our constitutional commitments and to pursue different values, but, on pain of incoherence, frustration, and hypocrisy, we are not free to ignore the consequences of the values we have chosen.

206. On the tension between these two values, viewed from the perspective of an increasingly international system of communication, see PRICE, supra note 66, at 233-46.

207. For example, one commentator has observed:

The NEA is several years younger than Madonna. Still, early in its brief existence it achieved the status of entitlement for those who found themselves for the first time beneficiaries of federal largess, or, in most of their cases, smallness. The dollar amounts may be minuscule by comparison with others flung hither and yon by Uncle Sam . . . but the amount of indignation that can be mustered by those liable to lose these nickels and dimes is truly spectacular. Not merely spectacular, but it has more sniffles and sobs than "Camille." Jonathan Yardley, NEA Funding: Dollars and Nonsense, WASH. POST, lan. 23, 1995, at B2; see also Tim Miller, An Artist's Declaration of Independence to Congress (July 4, 1990), in CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN

THE ARTS 244, 244-45 (Richard Bolton ed., 1992); Newt Gingrich, Cutting Cultural Funding: A Reply, TIME, Aug. 21, 1995, at 70; Jeff Jacoby, Endowment of Arrogance, BALTIMORE SUN, Aug. 9, 1995, at 17A; John Frohnmayer's Final Act, WASH. TIMES, Feb. 24, 1992, at E2 (discussing Frohnmayer's resignation as NEA chairman).

208. In 1995, the NEA's grant-making funds totaled approximately $ 138 million. See National Endowment for the Arts Office of Policy, Research, and Technology, Table Summarizing NEA Funding (Nov. 1995) (on file with the Yale Law Journal). In that same year, $ 265.6 million was appropriated through state art agencies, and an estimated $ 650 million was allocated by local governments. See NINA

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KRESSNER COBB, PRESIDENT'S COMM. ON ARTS & HUMANITIES, LOOKING AHEAD: PRIVATE SECTOR GIVING TO THE ARTS AND THE HUMANITIES 5 (1995). Furthermore, foundation funding for the arts in 1992, the most recent year for which complete data are available, totaled approximately $ 1.36 billion. See id. Finally, according to one survey, corporate funding for the arts in 1994 totaled $ 875 million. See id. Figures for individual giving to the arts are not readily available, but simply extrapolating from these estimates of government, foundation and corporate donations, it is likely that NEA support for the arts is about 5% of total donations.

This estimate may understate the extent of NEA influence, because the NEA is the single largest donor to the arts and because NEA grants are often highly leveraged through requirements for matching funds. See id. at 18-20. The NEA's national prestige also creates independent leverage, so that, as the President's Committee on the Arts and Humanities stated: "The funding patterns demonstrate a complex national cultural structure in which private and public donor sectors reinforce each other, funding different pieces and parts, exercising different priorities within the whole.... (T)he public and private sectors 'operate in synergistic combination."' Id. at 4.

It is also the case, however, that the estimate of 5% may strikingly overstate the extent of NEA influence because it does not account for income earned by artists and arts organizations directly through ticket sales, art purchases, and the like. We know, for example, that in disciplines like music, dance, and theater earned income can account for between 50% and 60% of total revenues. See President's Committee on the Arts and Humanities, Chart Displaying Sources of Operating Income for Various Disciplines (1994) (on file with the Yale Law Journal). For an argument that "the pervasive role the NEA plays in the art world and the funding mechanisms on which artists and museums depend" gives to it "the ability to effectively silence artists who express disfavored views," see Hawthorne, supra note 174, at 438. For a contrary view, see ALICE GOLDFARB MARQUIS, ART LESSONS: LEARNING FROM THE RISE AND FALL OF PUBLIC ARTS FUNDING 246-53 (1995).

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PROCEEDINGS AGAINST JOHN M. QUINN,

DAVID WATKINS, AND MATTHEW MOORE

Mr. Clinger, from the Committee on Government Reform and

Oversight, submitted the following

REPORT

of the

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

together with

ADDITIONAL AND DISSENTING VIEWS

EXECUTIVE SUMMARY

A. Introduction

Weeks after the firings of seven long-time White House Travel Office employees, President William J. Clinton staved off a congressional inquiry into this growing controversy by committing to House Judiciary Committee Chairman Jack Brooks on July 13, 1993: "...you can be assured that the Attorney General will have the Administration's full cooperation in investigating those matters which the Department wishes to review." No mention then of executive privilege from the President on withholding documents from investigators. The President repeated his promise of cooperation in January 1996 when he stated: "We've told everybody we're in the cooperation business ... That's what we want to do. We want to get this over with."

In just over a year after the President's initial assurances of cooperation, the President's own appointee as chief of the Justice Department's Office of Public Integrity, Lee Radek, complained in a September 8, 1994 memo to Acting Criminal Division chief Jack Keeney: "At this point we are not confident that the White House has produced to us all documents in its possession relating to the Thomason allegations ... the White House's incomplete production greatly concerns us because the integrity of our review is entirely dependent upon securing all relevant documents."

At this juncture, the Committee is also gravely concerned by the White House's "incomplete production."{White House's "incomplete production."[1] Like the Justice Department's Public Integrity Section before us, the "integrity of our review" is at stake as the White House continues to withhold relevant documents. The credibility gap of the White House has also grown as we have progressed in this investigation. {[1] The Committee wishes to acknowledge the efforts of those who have helped prepare this report: Kevin Sabo, General Counsel. Barbara Olson. Chief Investigative Counsel, Barbara Comstock, Investigative Counsel, and David Jones, Joe Loughran, Kristi Remington, and Laurie Taylor of the investigative staff. The Committee also appreciates the valuable assistance provided by Morton Rosenberg, Esq. of the Congressional Research Service.

It is never appropriate for the subject of an inquiry to determine what documents shall or shall not be turned over or identified in a privilege log. Particularly in this matter where the individuals in the Counsel's office who are withholding documents may also be the authors of some of the documents withheld, the Committee has a compelling interest to seek a complete compliance with its bipartisan subpoenas. Those who are the subject of an investigation are hardly objective in determining what is relevant to a congressional oversight investigation. Yet past Travelgate investigations have been thwarted by a White House Counsel's office intent on doing just that while delaying and denying the production of documents. As these facts are brought to light, White House operatives change the subject, attacking' the Committee because it continues to shine a light on White House actions long after other investigators gave up trying.

The Administration's resistance to oversight in this matter began almost immediately after the firings and demonstrates the culture of secrecy that has become its hallmark. In notes dated May 27, 1993, White House Management Review author Todd Stem wrote, "Problem is that if we do any kind of report and fail to address those questions, the press jumps on you wanting to know answers; while if you give answers that aren't fully honest (e.g., nothing re: HRC), you risk hugely compounding the problem by getting caught in half- truths. You run the risk of turning this into a cover-up." (Emphasis Added)

This White House embarked on an unmistakable course which frustrated, delayed, and derailed investigators from the White House itself, the GAO, the Federal Bureau of Investigation, and the administration's own Justice Department Office of Professional Responsibility and Public Integrity Sections. That is what has brought the Committee to this unfortunate impasse.

This White House simply refuses to provide this Committee with the subpoenaed documents that will help us bring this Travel Office investigation to a close, something that I have sought to do for nearly three years. Documents inexplicably have been misplaced in "stacks" or "book rooms" or storage boxes,

where they languished for months if not years, despite subpoenas and document requests from numerous official investigative bodies.

If President Clinton responds to investigations of supposedly minor internal problems this way, how does he handle far more serious national and international matters? This administration's culture of secrecy could have disastrous consequences where critical national policy matters involving foreign affairs are concerned. Let there be no misunderstanding. What we have before the Committee should not be the issue of a constitutional confrontation. This Committee seeks no records pertaining to the national security. This is not Bosnia. This is not Iran. International relations are not at stake.

When the White House, as in the case here, fails to comply fully with investigations mandated by Congress or senior Justice Department officials, the oversight role critical to our system of checks and balances is compromised and it is incumbent upon this Committee to assert and to uphold its jurisdiction and congressional prerogatives.

In the course of the Committee's investigation, such documents as the Watkins "soul cleansing" memo and a Watkins letter to the First Lady "appeared" for the first time even though both documents were created, requested and subpoenaed years ago. Testimony by a former White House attorney and a present White House official demonstrated that while this document was discussed between and among at least three White House officials, it never was produced in any prior document productions. A Travel Office notebook kept by the late Deputy Counsel Vince Foster was withheld from relevant investigators, including the Independent Counsel, for two years. The Committee's attempt to question one witness about a belatedly-discovered document was met with an assertion of executive privilege when Committee Counsel questioned the witness about conversations she had with the White House Counsel's office.[White House Counsel's office.[2] [[2] See Deposition of Carolyn Huber.

These documents, and many others, never were provided to previous investigations. They were provided to this Committee only months after the Committee began seeking responsive documents and long after the White House Counsel assured the Committee that it had received almost all substantive documents. This raised concerns with the Committee that the same White House stonewalling that had compromised previous investigations once again was occurring with the Committee's investigation. The Committee issued bipartisan subpoenas in January 1996, after it determined that it A,as essential to obtain all documents, including those regarding the White House responses to previous investigations as well as the Committee's own investigation. due to the consistent pattern of stonewalling over the past three years. In addition, throughout the course of the Committee's investigation, White House Counsel was in regular contact with counsel for former and present White House employees and in one case even contacted a witness who had agreed to a Committee interview. The interview was canceled following the White House contact.

White House Counsel John M. Quinn, the primary subject of this Committee's contempt proceeding, informed the Chairman in a meeting on May 8, 1996, that he had not even begun gathering the documents at issue. The gathering of these documents, and the invocation of the procedures outlined in the Reagan memorandum, should have begun long before the May 9, 1996, business meeting at which the Committee voted Mr. Quinn in contempt of Congress. In fact, Mr. Quinn's statements are at odds with a February 1, 1996, memo that Mr. Quinn

himself sent to all staff of the White House regarding the subpoena from this Committee. In the memo, Mr. Quinn detailed all of the items on the Committee's subpoena and directed staff to produce all "responsive records that fall within the above categories" by February 7, 1996, to Elena Kagan, an Associate Counsel in Mr. Quinn's office.. Mr. Quinn also had sent a memo on December 19, 1995 to gather documents.

In an August 23, 1995, letter to the Committee, the White House said that document production timetables suggested by the Committee -- documents produced within 15 days and privilege logs within five days -- were "reasonable goals." The Committee sent its first document request on June 14, 1995, after a long correspondence with the White House concerning the Travel Office matter. Our second request was sent on September 18, 1995. Bipartisan subpoenas were issued on January II, 1996. We have gone far beyond what the White House itself acknowledges was "reasonable." Yet, now, the White House, in my view, is trying to further delay producing these documents or avoid doing so altogether.

The compliance date for the subpoenas was more than three months ago. The time for the White House Counsel to seek to avoid contempt has come and gone. The White House neither has complied with this Committee's subpoenas nor has it offered a legally rational basis for its refusal to comply.

It is troubling that the President of the United States persists in his efforts to cover-up a scandal having no connection with any national security or vital domestic policy issue. In the final analysis, the Travel Office matter reflects the character of the President and his presidency.

B. Background

Since the controversial firings of the longtime White House Travel Office employees, the history of the investigations into what has become known as "Travelgate" has been one of a White House intent on keeping investigators at bay and relevant documents under wraps. While this Committee has succeeded in obtaining far more information and records than has any previous investigation into the Travel Office firings, the record is still incomplete because of the insistence of the President to withhold documents from the American public by taking the extraordinary step of invoking an undefined, vague, and ultimately ineffective protective assertion of executive privilege.[ineffective protective assertion of executive privilege.[3]

This Committee has a compelling need for the disputed documents to obtain a complete record of events related to the Travel Office matter in order to resolve the issues as to how and why previous investigations did not meet with White House cooperation. The subpoenaed records are necessary for the Committee to resolve by direct factual evidence, fundamental factual questions relating to the actions, direction, knowledge, recommendations, or approval of actions by individuals in the White House, in responding to the allegations about the Travel Office employees as well as the subsequent investigations into the White House Travel Office matter. This report will outline in great detail a pattern of activity by this Administration to deny and delay access to relevant records to several investigative bodies, including this Committee.

It has been White House policy since the Kennedy Administration not to invoke executive privilege when there are allegations of criminal wrong-doing at issue. Certainly that is the case here. Already there has been a criminal referral

concerning statements made by David Watkins, a former White House senior official. Further, the Independent Counsel has had his jurisdiction expanded to encompass the Travelgate matter. In light of that expansion, the actions of the White House are particularly troubling. [[3] As will be discussed in this report, the President has not submitted a formal assertion of executive privilege to this Committee. Instead, on the morning of the Committee's vote, the Counsel to the President informed the Committee that he had been instructed by the President to assert executive privilege as a protective measure until such time as his advisors could collect and review the documents in dispute. The Committee has obtained a February 1, 1996, memo addressed to all White House staff from White House Counsel Jack Quinn requesting receipt of all subpoenaed documents by February 7, 1996. Mr. Quinn's current statement that he needs more time to gather the requested documents appears to be at odds with the documentary record.

President Reagan, for example, waived all claims of executive privilege during the Iran-Contra investigation. Attorney General William French Smith, who generally proposed a very broad theory of executive privilege during his tenure, even admitted that he would not try "to shield documents [try "to shield documents [from Congress] which contain evidence of criminal or unethical conduct by agency officials from proper review."[review."[4]

More than a century ago, even President Andrew Jackson, "a jealous defender of executive prerogatives, told Congress that if it could point to any case where there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove shall be interposed to prevent the fullest scrutiny by all legal means."[interposed to prevent the fullest scrutiny by all legal means."[5]

The lengthy record established by the Committee, and detailed in this report, demonstrates concerted efforts over a sustained period of time to delay and deny records to investigative bodies. In refusing to produce the outstanding records to this Committee, the President, substituting his judgment as to what materials are necessary for the inquiry, has placed the full executive powers of the Presidency against the lawful subpoenas of the U.S. House of Representatives.

On June 1, 1993, Congressman William F. Clinger, Jr., then the ranking minority member on the House Committee on Government Operations, called on the Committee to investigate the chain of events which resulted in the termination of seven hard-working White House Travel Office workers.[Travel Office workers.[6] These Travel Office employees, many of whom had worked for numerous Presidents over the course of three decades, summarily were fired and driven from the White House. One employee learned of his termination by watching CNN in a hotel while he was on government travel. Another worker learned that he was fired from his son, who had watched a network news program. [[4] Letter of November 30, 1982, to Congressman John Dingell, reprinted in H.Rep. 968, 97th Cong., 2d Sess. 41 (1982). [[5] Fisher, Louis, Constitutional Conflicts between Congress and the President, p. 205. [[6] After nearly three years of seeking cooperation in this investigation, Chairman Clinger has afforded White House Counsel John M. Quinn, David Watkins, and Matthew Moore every opportunity to produce the records which were subpoenaed in January 1996. At the Chairman's request, the Congressional Research Services' American Law Division has submitted an analysis to the Committee reviewing the legal steps required to hold an individual in contempt of Congress under 2 U.S.C. Sections 192 and 194. This analysis is provided in Appendix 1.

Not only did the White House fire these workers, it claimed to the national media that the Federal Bureau of Investigation (FBI) was conducting a criminal review. Shortly thereafter, the airline company providing charter service to the Travel Office was served a summons by the Internal Revenue Service (IRS) and subjected to a two-and-one- half-year audit. Coincidentally, a senior White House aide had warned the FBI just days earlier that if the FBI did not assist the White House in this matter, the IRS would be called.

Over the next several weeks, Congressman Clinger's call for an investigation was repeated throughout the U.S. Senate and House.

Unfortunately, the "full cooperation" promised by the President never was forthcoming. Numerous records of what occurred at the Travel Office never were provided appropriately to the Justice Department or any other investigative organization. Five separate investigations were conducted into one aspect or another of the Travel Office firings. The only consistency between each of these five previous investigations was that the White House was successful in its attempts to delay and deny production of many relevant documents. The Justice Department's Public Integrity Section complained in an internal memorandum that material records were withheld during the course of its review. The General Accounting Office (GAO), conducting an investigation requested by a statute signed by President Bill Clinton, was denied vital records after months and months of requests. Recently, the GAO referred a former senior White House aide to the Justice Department for prosecution for providing false information.

By January, 1995, Congressman Clinger was the chairman of the new House Committee on Government Reform and Oversight. He announced that a thorough investigation into the growing Travel Office scandal would be forthcoming. Beginning on June 14, 1995, the Committee submitted document requests to the White House. The White House took months to respond to a subsequent September 18, 1995 document request, acknowledged in correspondence in August 1995 that a two week response time to document requests was a reasonable goal. The Committee was assured in October 1995 that almost all of the substantive records had been provided.

Three hearings were held and bipartisan subpoenas were issued when documents repeatedly were delayed and denied to the Committee. Specifically, on January 11, 1996, Chairman Clinger authorized and issued subpoenas under authority granted to him by House Rule XI, clause 2(m) and Committee Rule 18(d). These subpoenas were issued, inter alia, to the Custodian of Records at the White House,[inter alia, to the Custodian of Records at the White House,[7] and David Watkins,[8 and Matthew Moore,[David Watkins,[8] and Matthew Moore,[9] personally. Negotiations over access to records began. The White House continued to "locate" previously requested documents and to produce groupings of documents without articulating any credible reason why they had been withheld until that point.

Finally, on March 15, 1996, the White House made a small production of documents pursuant to the Committee's subpoena that included yet another previously unproduced Watkins handwritten letter to Mrs. Clinton dated May 3, 1994. An explanation for the White House's failure to produce this document for nearly two years during the course of numerous other document requests and subpoenas finally was proffered by the White House on April 5, 1996. Assistant to the President and White House Counsel John M. Quinn responded only that it was located in a stack of unsorted, miscellaneous papers and memorabilia in

the Office of Personal Correspondence after having been forwarded to Presidential Assistant Carolyn Huber by the First Lady.[Lady.[10] [[7] The subpoena issued to the Custodian of Records at the White House was received by Jane Sherburne, Special Counsel. The documents in question are in the custody and control of John M. Quinn, White House Counsel. A copy of the subpoena issued to the Custodian of Records is provided in Appendix 2. [[8] A copy of the subpoena issued to David Watkins is provided in Appendix 3. [[9] A copy of the subpoena issued to Matthew Moore is provided in Appendix 4. [[10] During a Committee deposition with Carolyn Huber on April 23, 1996, the Committee was notified that the White House had instructed Ms. Huber to assert executive privilege-over any communications with the White House Counsel's office.

On May 2, 1996, Chairman Clinger formally notified Counsel to the President John M. Quinn, Attorney General Janet Reno, and former White House aides David Watkins and Matthew Moore that they were not in compliance with subpoenas issued by the Committee in early 1996 and were subject to be held in contempt of Congress. The Attorney General resolved issues of outstanding records with the Committee prior to the May 9, 1996 compliance date. In a letter to Mr. Quinn, Chairman Clinger stated: "I have reviewed all of our numerous communications and correspondence regarding compliance with our subpoenas and am frankly amazed that we are still seeking full production more than three months after the stated due date... I am advised that the White House has also intervened with individuals who were subpoenaed by this Committee by requesting that such individuals send their documents to the White House rather than directly to the Committee.

The White House's continued foot dragging and obfuscation as the Committee attempts to bring closure to this investigation must come to an end. Accordingly, I am calling in all documents responsive to our subpoenas of January 11, 1996, to be delivered by close of business on May 8, 1996... I have scheduled a meeting of the Committee on Government Reform and Oversight for the morning of May 9, 1996 to resolve these and other outstanding document issues. At that time, I Will request a Committee vote to compel the production of outstanding records under penalty of contempt."[records under penalty of contempt."[11]

Unfortunately, the White House response was typical of the dealings the Committee has experienced with the Clinton Administration since 1993. In a May 2, 1996, letter addressed to Chairman Clinger, Mr. Quinn hid behind the presidential election season in an attempt to blunt the Committee's legitimate investigation. No explanation was provided as to why the White House had vet to provide the Committee with a privilege log or why documents still were being produced three months after the due date of the subpoena. Significantly, Mr. Quinn cited no legal basis or any case law in support of withholding subpoenaed documents. [[11] A copy of the Committee's business meeting notice and draft copy of the House Resolution citing the respective individuals for contempt were included with the letter.

On the morning of May 3, 1996, Mr. Quinn spoke to Chairman Clinger by telephone in an attempt to reach a consensus on the documents or at least delay the Committee's actions. Chairman Clinger informed Mr. Quinn that it would be helpful to have a better understanding of the nature of the documents in dispute, which is why the Committee requested a privilege log. Mr. Quinn stated that he would try to produce such a document.

On the evening of May 3, 1996, Mr. Quinn telecopied a letter to Chairman Clinger which cryptically described the contents of the disputed records. No privilege log was provided. Mr. Quinn described the disputed documents as follows:

1. Documents relating to ongoing grand jury investigations by the Independent Counsel;

2. Documents created in connection with Congressional hearings concerning the Travel Office matter; I and

3. Certain specific confidential internal White House Counsel office documents including "vetting" notes, staff meeting notes, certain other counsel notes, memoranda which contain pure legal analysis, and personnel records which are of the type that are protected by the Privacy Act."[protected by the Privacy Act."[13] [[12] This Administration has followed a long history of providing congressional committees with documents created in connection with congressional hearings. See, Morton Rosenberg, Legal and Historical Substantiality of Former Attorney General Civiletti's Views as to the Scope and Reach of Congress' Authority to Conduct Oversight of the Department of Justice, CRS, October 15, 1993, in Damaging Disarray - Organizational Breakdown and Reform in the Justice Department's Environmental Crimes Program, Staff Report of the Subcom. on Oversight and Investigations, House Committee on Energy and Commerce, 103rd Congress, 2d Session, 321350, Comm. Print No. 103-T, 1994. [[13] This vague, broad and non-descriptive category of withheld documents, if accepted by the Committee, would be tantamount to accepting a type of broad, undifferentiated claim of executive privilege which was rejected by the court in US. v. Nixon, 418 U.S. 683 (1973).

Chairman Clinger responded to Mr. Quinn on the morning of May 6, 1996, to remind him that the Committee was seeking internal deliberative documents due to the pattern of conduct established by the Counsel's office in previous investigations. The documents identified in the three categories by Mr. Quinn are needed by this Committee to resolve the questions surrounding the White House Counsel Office's involvement in prior investigations. It would be irresponsible for this Committee to allow the subject of an inquiry to determine what documents shall or shall not be shared with Congress.

In his letter to Mr. Quinn, Chairman Clinger stated: "When I met with you on February 15, 1996, you presented an offer to resolve our ongoing document dispute by providing the Committee with limited access to some of the disputed materials as long as we surrender our right to demand the remaining categories of documents. If we refused your offer, I understood, the entire "basket" of disputed documents would be withheld and our disagreement would continue. This was presented as your final offer ... The effective result of my letter of May 2, 1996, was to formerly reject your offer and notify you that a determination was reached concerning the withheld documents.

Chairman Clinger offered Mr. Quinn the opportunity, in another letter dated May 7, 1996, to draft a statement to the Committee addressing any valid executive privilege assertions in order to explain to the Committee why he should not be held in contempt of Congress for his failure to produce subpoenaed documents.

The Committee is determined to ensure that the Clinton Administration does not succeed in its attempt to limit Congress' Travel Office investigation as it has done with every preceding investigation. The issuance of subpoenas was not sufficient to ensure the production of all relevant records. Unfortunately, it is necessary to take the serious step of holding parties who fail to produce requested documents in contempt.

C. Importance of Oversight of the White House

From the earliest days of our government, courts have recognized "the danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered."[14 In McGrain v. Daugherty,{unduly hampered."[14] In McGrain v. Daugherty,[15] the Court described the power of inquiry, with the accompanying process to enforce it, as "an essential and appropriate auxiliary to the legislative function." As Senator Sam Ervin noted 25 years ago: "When the people do not know what their government is doing, those who govern are not accountable for their actions -- and accountability is basic to the democratic system. In effect, those who govern are insulated from the effects of their actions, and the populace is precluded from obtaining the knowledge that is necessary to control the actions of the government in the manner envisioned by the Founding Fathers."{the Founding Fathers."[16]

Congressional oversight is an essential tool in holding the Executive Branch accountable for its actions. When oversight is conducted into possible inappropriate activity at the White House, this concept of accountability is particularly important. Unlike all other federal agencies, the White House has no Inspector General. The highest office in the land cannot be held to a lower standard of accountability. Vigorous oversight of the Executive Branch must not be thwarted if we are to preserve our trust in the highest office of the land.

Finally, lest there be any misunderstanding of the appropriateness of public disclosure of certain materials under the proper circumstances, it must be remembered that the informing function is one of the manifold responsibilities of Congress in conducting oversight. As Woodrow Wilson wrote: [[14] Watkins i,. United States, 354 U.S. 178 (1957). {[15] 273 U.S. 135, 174-175 (1927). [[16] "Executive Privilege: The Withholding of Information by the Executive." Hearings before the Subcommittee on the Separation of Powers, Senate Judiciary Committee, 92nd Congress, 1st Session (1971), p.4. "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what is sees ... Unless Congress has and uses every means of acquainting itself with the acts and the disposition of the administrative agents of the Government, the country must be helpless to learn how it is being served ... The informing function of Congress should be preferred even to its legislative function. The argument is not only that a discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.."[its administration.."[17] [[17] 354 U.S. at 200, Footnote 33.

D. Committee Action

The subpoenas issued in early January 1996, were not complied with on the return date of January 22, 1996, or any subsequent date thereafter. On Thursday, May 9, 1996, the Committee met in open session at 10:00 a.m. in Room

2154 Rayburn Office Building for the purpose of determining what action should be taken in view of the failure of White House Counsel John M. Quinn, former White House aide David Watkins, and former White House aide Matthew Moore, to comply with the subpoena. The Committee, a quorum being present, on a record vote of 27-19, recommended the adoption of a resolution as follows:

Resolved, That pursuant to 2 U.S.C. 192 and 194, the Speaker of the House certify the report of the Committee on Government Reform and Oversight, detailing the refusal of John M. Quinn to produce papers to the Committee on Government Reform and Oversight, to the United States Attorney for the District of Columbia, for him to be proceeded against in the manner and form provided by law; and be it further

Resolved, That pursuant to 2 U.S.C. 192 and 194, the Speaker of the House certify the report of the Committee on Government Reform and Oversight, detailing the refusal of David Watkins to produce papers to the Committee on Government Reform and oversight, to the United States Attorney for the District of Columbia, for him to be proceeded against in the manner and form provided by law; and be it further

Resolved, That pursuant to 2 U.S.C. 192 and 194, the Speaker of the House certify the report of the Committee on Government Reform and Oversight, detailing the refusal of Matthew Moo re to produce papers to the Committee on Government Reform and Oversight, to the United States Attorney for the District of Columbia, for him to be proceeded against in the manner and form provided by law.

If the House of Representatives failed to pursue all legal steps to vindicate its right to this information, it would undermine severely this investigation into the facts surrounding the termination of the seven innocent Travel Office employees. Accordingly, the Committee voted to report to the House a contempt resolution for John M. Quinn, David Watkins, and Matthew Moore. Upon adoption by the House. the resolution would direct the Speaker to turn the matter over to the U.S. Attorney for prosecution in accordance with 2 U.S.C. sections 192 and 194.

That offense carries a maximum sentence of 1 year in prison, plus fines.

This report will summarize the events which occurred before and after the seven Travel Office workers were fired on May 19, 1993, including the history of official investigations and the current dispute over records. Also provided is a chronology of what this Committee considers to be stonewalling on the part of White House officials as part of their efforts to deny and delay official investigative bodies access to pertinent records. The Committee report also discusses in detail the various claims made by the condemners to justify their denial of the requested information and a chronology of the correspondence that has transpired between the Committee and White House officials during the past three years. Appendices include a Congressional Research Service legal opinion and copies of the relevant subpoenas.

FINDINGS

1. The Committee on Government Reform and Oversight has the jurisdiction and authority, pursuant to House Rule X, 1(g) and XI, 2(m)(2) to conduct an investigation into the White House Travel Office matter and the subsequent

investigations of this matter and to require the production of documents by the White House, the Department of Justice and individuals who have withheld documents.

2. White House Counsel John M. Quinn's letter invoking an undifferentiated protective executive privilege assertion over a vaguely defined group of documents of unknown quantity and substance at the direction of the President is an ineffective invocation of the privilege under the guidelines established by President Ronald Reagan and adopted by President Bill Clinton.

3. White House Counsel John M. Quinn's refusal to turn over subpoenaed records, issued with bipartisan agreement, or to properly invoke a valid claim of executive privilege has needlessly provoked a constitutional confrontation. The White House has unnecessarily strained our system of government and interfered materially with the ability of Congress as well as prior investigative bodies to fulfill oversight responsibilities in.a timely fashion.

4. The Attorney General has provided no legal opinion to support the President's blanket undifferentiated protective invocation of privilege. In fact, during her tenure, the Attorney General has turned over documents similar to some of those sought in the present matter when dealing with prior Congressional investigations.

5. A disclosure of arguably privileged documents to a congressional committee pursuant to a subpoena and the threat of citation of contempt would not waive the claim of privilege in an,., other forum.

6. The assertion of attorney-client and work product privileges by David Watkins and Matthew Moore with respect to withheld drafts of the Watkins' "soul cleansing" memo are without legal foundation. There is no credible evidence that Watkins established an attorney- client relation with Moore; and even if established, it was waived by its disclosure to Patsy Thomasson, other White House personnel, and to the media upon its discovery in Thomasson's files. The failure to maintain confidentiality also waives any claim under the work produce doctrine.

7. The ongoing criminal investigation by the Independent Counsel into the White House Travel Office matter and the criminal referral of a high ranking White House official who was centrally involved in this matter makes the withholding of documents particularly troubling. President Bill Clinton has altered a policy in effect since the Kennedy Administration. The operative policy has always been to refuse to claim executive privilege when allegations of wrongdoing are at issue.

8. Despite White House claims to the contrary, the unknown quantity and substance of undefined documents withheld are directly relevant and necessary to the Committee's inquiry into the response by the White House to the various investigations over the past three years as well as the dilatory responses to this Committee.

9. The-White House's statements about the large quantity of documents produced and its self-serving pronouncements regarding compliance do not amount to responsiveness to either the Committee's needs or the bipartisan subpoenas. Congress makes the determination of what documents are necessary for an investigation; the President does not make that determination.

10. The examples of extensive delays by the White House to this and all previous investigations detailed extensively in the record contradict White House statements that it accommodated and cooperated with this or previous investigations into the Travel Office matter. Numerous government officials as well as this Committee concluded the White House has behaved in a dilatory manner when responding to matters related to the White House Travel Office investigation.

11. The White House has made misleading statements in describing some of the withheld documents suggesting alternatively that the number of documents withheld was "small" at first. The Attorney General claims there is a "large" group of documents to review for executive privilege assertion.

12. Despite extensive efforts by the Committee to engage in voluntary document production, the White House engaged in a long- drawn-out and selective documents production only as this Committee applied increasing pressure or as outside sources came forward with similar information.

FACTS, BACKGROUND, AND FINDINGS

A. President Terminates Employment of Seven Career Travel Office

Workers

At approximately 10:00 a.m., on May 19, 1993, all seven members of the White House Travel Office staff summarily were fired. The five Travel Office employees present in the White House that day were ordered to vacate the White House compound within two hours. Returning to, their Travel Office by 10:30 a.m., the fired Travel Office employees found their desks already occupied by employees of World Wide Travel, the Arkansas travel agency which arranged for press charters during the Clinton presidential campaign.

Two White House Travel Office employees were absent from the White House Travel Office on May 19, 1993, one on a White House advance trip to South Korea, the other on vacation. They learned of their firings, respectively, via CNN telecast and from a son who saw Tom Brokaw announce the firings on network news that night. The seven White House Travel Office employees had served from 9 to 32 years in the White House Travel Office.

The five Travel Office employees who were present in the White House for their firings ultimately were given additional time to complete their White House out-processing. By early afternoon, they heard then White House Press Secretary Dee Dee Myers announce at a press briefing that they were the subject of an FBI criminal investigation. They had been given no such indication at the time of their dismissals. After completing the out-processing, the five Travel Office employees present on May 19, 1993, were driven out of the White House compound in a panel van with no passenger seats, seated only on their boxes of personal belongings.

It subsequently was revealed that the events precipitating the Travel Office firings had intensified almost a week before, on May 13, 1993, when Associate White House Counsel Bill Kennedy summoned the FBI to the White House. He informed the FBI that those at "the highest level" in the White House wanted prompt action on a matter allegedly involving financial wrongdoing. The FBI dispatched two sets of agents to consider jurisdictional issues. The first

pair tried to tell their superiors they weren't the "right guys for the job," recommending that a field agent be sent per standard procedure. Mr. Kennedy was "adamant" that headquarters personnel with a "national perspective" be involved. Senior FBI officials complied, sending the acting chief of the Violent Crimes and Major Offenders section to the White House Travel Office.

The second set of FBI agents met with Catherine Cornelius, the President's cousin, on May 13, 1993. David Watkins had dispatched Ms. Cornelius to the Travel Office, where she copied and removed documents. In the wake of Ms. Cornelius' own meetings with Mr. Harry Thomason, a Hollywood producer and longtime friend of the President and the First Lady, allegations of kickbacks and expensive lifestyles were raised against the Travel Office employees. The FBI accepted Ms. Cornelius' recitation of these otherwise unsubstantiated allegations as sufficient predication to launch a criminal investigation.

Even as the FBI informed the White House it had sufficient predication to launch an investigation on May 13, 1993, the White House Counsel's office shifted gears, informing the FBI agents that the White House first would conduct an outside audit, and later allow the FBI to proceed with an investigation if one were warranted. The FBI insisted it should be present at the Travel Office during the audit but Deputy White House Counsel Vince Foster and Mr. Kennedy overruled it. The FBI acquiesced.

On May 14, 1993, the White House brought in an "independent auditor" who was in fact neither independent nor an auditor. The management consulting (not the public accounting) arm of KPMG Peat Marwick was engaged to conduct a management review. KPMG Peat Marwick's engagement letter, draft and final reports all stated that it was not asked to and indeed did not conduct the procedures necessary for an "audit, examination or review in accordance with" established accounting standards.

On Monday, May 17, 1993, Mr. Watkins wrote a memo to Chief of Staff Thomas F. (Mack) McLart), regarding the planned Travel Office firings. Mr. Watkins copied this memo to the First Lady. The memo was telecopied to Director of Media Affairs Jeff Eller, who was traveling with the President in California. Mr. Eller discussed the memo with presidential advisor and confidant Bruce Lindsey. White House Management Review notes indicate that Mr. Lindsey discussed the memo with the President in California.

Well before the final KPMG Peat Marwick report was written, the White House decided to fire the Travel Office employees on Wednesday, May 19, 1993, and so advised the FBI. The FBI warned that the firings would harm the investigation it initiated on May 14, 1993, but the White House ignored its concerns and, once again, the FBI and Justice Department acquiesced.

After the Travel Office firings were announced at a May 19, 1993, press briefing, KPMG Peat Marwick partner Larry Herman was ushered into a meeting with George Stephanopoulos, Dee Dee Myers, Vince Foster, Bill Kennedy, Ricki Seidman and Harry Thomason and greeted with the question, "Where the hell is the report?" The White House hid only a few pages of draft material when it announced the firings it said were based on the KPMG Peat Marwick report. The press repeatedly asked for the report in the May 19, 1993 press briefing.

Both the President and First Lady were informed of the Travel Office matter prior to the May 19, 1993 firings. Harry Thomason, Vince Foster and David

Watkins appear to have advised the First Lady regularly about Travel Office particulars. Harry Thomason worked at the White House late into the night on May 13, 1993, and Mr. Foster's Travel Office file indicates the First Lady received updates from both Mr. Foster and Mr. Watkins that evening. Other White House notes reveal that Mr. Thomason also had conversations with the First Lady about the firing of the Travel Office employees. Talking points had been prepared for May 13th stating that Travel Office employees had been fired that day and that the FBI was performing an audit of the Travel office.

Mr. Thomason was back in the White House on May 14, 1993, and throughout the following week. During the course of a World Wide Travel employee's White House Management Review interview, Fan Dozier told John Podesta she had talked with Mr. Thomason on May 16, 1993, and Mr. Thomason said, "you mean you're not up there working [in the Travel Office]?" and added that he would call the First Lady and she would be very upset to hear that World Wide Travel was not already in place.

Mr. Thomason told White House staff that he learned the Travel Office employees were accepting "kickbacks" from friends in the air charter industry. He told Mr. Watkins he spoke to the First Lady about the matter and that she was anxious to get "our people" into the office because "we need the slots." Mr. Thomason told Mr. Watkins, Mr. Foster and others that-firing the employees would be a "good story." When White House staffer Jennifer O'Connor asked him if he had any evidence, Mr. Thomason said he did.

In fact, although the President later claimed in a press conference that he had heard rumors everywhere, it appears that Mr. Thomason and Ms. Cornelius were the primary, if not the sole sources of allegations against the Travel Office employees reaching the White House. Meanwhile, Mr. Thomason was involved. in a number of other activities at the White House. "Put me in front of the right person at the White House and I will prove the value of both the project and Thomason's capabilities," Darnell Martens wrote Harry Thomason, his business partner in Thomason; Richland and Martens, Incorporated ("TRM"). Subsequent memos referred to "a memo to Harry Thomason which was presented to and discussed with the President In mid-February" and a request indicating the President needed to "issue an executive order" and "enter into a consulting agreement with TRM" to get projects for TRM, Incorporated going.

Mr. Thomason spoke both with President Clinton and presidential confidant Bruce Lindsey about obtaining their assistance in his efforts to win a sole source government contract at GSA to audit the entire federal civilian aircraft fleet and "revitalize" the aircraft industry. Mr. Martens, who like Mr. Thomason had received his own White House pass, secured OMB and GSA assistance for his proposals. The White House claims it pulled the plug on this scheme sometime in the summer of 1993, during the course of the Travel Office investigations. When the scope of his White House influence became controversial, Mr. Thomason said, "I do find it surprising that a person who was as instrumental as I was in the Clinton campaign cannot pick up a phone in the White House and ask for information from people."

Ms. Cornelius was "selected" to replace seven veteran Travel Office employees. She Followed directions given by David Watkins and brought in World Wide Travel without a competitive bid. World Wide, the Clinton/Gore campaign's travel agency, withdrew from the White House within two days of their arrival in the wake of intensive press scrutiny.

Within days of the Travel Office firings, the media reported that Mr. Thomason had telecopied an undated memo by Mr. Martens to the White House on May 10, 1993, which contradicted their claims of having no interest in Travel Office business. The memo in fact discussed efforts by Mr. Martens to seek the business. It was reported that Ms. Cornelius had proposed in a February 15, 1993, memorandum that she be placed in charge of the Travel Office, assuming a role she had in the Clinton campaign. White House documents indicate that when the Travel Office story broke, Mr. Watkins and Patsy Thomasson asked Ms. Cornelius and a second employee to lie about the February 15, 1993, memo by saying that Mr. Watkins never read it.

Mr. Martens summoned air charter broker Penny Sample to the White House without a competitive bid. Ms. Sample also had worked on Clinton/Gore campaign travel charters with TRM, Incorporated. The White House claimed that Ms. Sample came on a voluntary basis but after she received what was touted as "erroneous commissions," she was asked to leave the White House.

On May 21, 1993, after World Wide Travel decided to leave the White House, Patsy Thomasson held a closed-door meeting with American Express while Secret Service agents guarded the door, according to White House Management Review notes. Later that day, George Stephanopoulos announced that American Express would be brought into the White House, but the White House subsequently claimed it was putting the contract out to bid. American Express won and entered the Travel Office the following Monday.

Also on May 21, 1993, the Internal Revenue Service raided the Smyrna, Tennessee, offices of UltrAir, a small company which provided most of the Travel Office's domestic press charters and which stood accused by Harry Thomason of participating in kickbacks. Two years after an expensive and distracting investigation, UltrAir was cleared of any wrongdoing. A former UltrAir executive who also was audited actually received a $ 5,000 tax refund.

While the Travel Office employees served at the pleasure of the President, their precipitous firings and replacement by the Clinton campaign's primary travel agency immediately raised a storm of criticism. Administration claims that it had acted in order to save the press and taxpayers money were met with skepticism by a White House press corps which responded with a litany of complaints of over billing and undocumented charges by World Wide Travel itself throughout the 1992 campaign. In addition, the Clinton Administration's announcement that an FBI criminal investigation had been launched was highly improper and, in fact, questionable when it was announced. Furthermore, Attorney General Janet Reno considered White House contacts with the FBI in the days leading up to and immediately following the Travel Office firings also were considered improperly handled, who publicly admonished the Administration for them.

B. Members of Congress Call for Investigation

Members of the House and the Senate immediately raised concerns about the manner in which the Travel Office firings took place. In the face of press, public and Congressional outcry, the White House placed five of the seven Travel Office employees on,administrative leave with pay on May 25, 1993, and announced that it would conduct a White House Management Review of the Travel Office and the Administration's role in the Travel Office firings. The fired Travel Office director and deputy director retired.

On June 1, 1993, William F. Clinger, Jr., the then-ranking minority member of the House Government Operations Committee, requested that then-Chairman John Conyers, Jr., hold hearings on the White House Travel Office firings.

Then-White House Chief of Staff Thomas F. (Mack) McLarty and then-Office of Management and Budget Director Leon Panetta released the White House Travel Office Management Review on July 2, 1993, and announced the reprimands of four White House staffers. Reprimanded were: Associate Counsel to the President, William H. Kennedy III; Assistant to the President for Management and Administration, David Watkins; former Special Assistant to the President for Management and Administration, Catherine A. Cornelius; and Deputy Assistant to the President and Director of Media Affairs, Jeff Eller. At least three of the four first learned of the "reprimands" during their televised announcement. None of the reprimands were documented in the personnel files of any of the four.

Also on July 2, 1993, the Supplemental Appropriations Act of 1993 (P.L. 103-50) was signed into law, requiring the United States General Accounting Office (GAO) to "conduct a review of the action taken with respect to the White House Travel Office."

In addition to the White House Management Review and the GAO Report entitled "White House Travel Office Operations" (Released on May 2, 1994), at least three other reports were prepared concerning various aspects of the White House Travel Office firings. These reports were prepared by: the Office of Professional Responsibility (OPR) of the United States Department of Justice (dated March 18, 1994 and released by the Committee on October 24, 1995); a Federal Bureau of Investigation Internal Review of FBI Contacts with the White House (dated June 1, 1993), and the Department of Treasury Inspector General Report "Allegation of Misuse of IRS RE: ULTRAIR" (dated June 11, 1993).

The OPR report was initiated on July 15, 1993, by then-Deputy Attorney General Phillip Heymann in an e-mail message to Justice Department aide David Margolis. This report was in response to Congressional pressure for more answers as well as the President's commitment in a July 13, 1993, letter to then-Chairman Brooks of the House Judiciary Committee pledging that he would cooperate fully with any inquiry.

On September 23, 1993, after consultations with majority staff of the Government Operations Committee, Mr. Clinger withdrew his request for Committee hearings on the White House Travel Office firings, "contingent upon the adequacy of the GAO effort" which had been mandated by Congress through P.L. 103-50.

Individually and collectively, the five reports prepared concerning the White House Travel Office left many questions unanswered and, in fact, raised many more. Several Members of Congress, including Mr. Clinger, sought to have these questions answered through further investigation and Congressional hearings. In a letter dated October 7, 1994, Mr. Clinger and 16 other House Members again requested Congressional hearings on the White House Travel Office in order to "address serious questions arising from, or unanswered by, the General Accounting Office (GAO) Report to Congress, White House Travel Office Operations (GAO/GGD-94-132)."

Mr. Clinger's request was accompanied by a 71-page minority analysis of issues unaddressed by any of the previous five reports. This analysis reviewed

contradictions concerning memoranda drafted by Catherine Cornelius outlining its new organizational structure and placing her in charge, activities of Harry Thomason and Darnell Martens; mismanagement by David Watkins; White House reasons justifying the Travel Office firings; contacts between Dee Dee Myers and Darnell Martens; public disclosure of the FBI investigation; possible influence on the FBI; the integrity of Travel Office records; the role of the President, the reprimands, and inaccuracies and insufficiencies in the GAO report on the White House Travel Office. In response to this report, then-Chairman Conyers of the House Government Operations Committee wrote then-Ranking Member Clinger, "You have raised serious questions about GAO's report to Congress" and asked that GAO provide a "detailed response" to Mr. Clinger's concerns. No such response was provided.

C. Committee's Investigation

Soon after the November, 1994, Congressional elections, Mr. Clinger, Chairman of the Government Reform and Oversight Committee of the 104th Congress, announced that he would hold hearings on the White House Travel Office firings. In December, 1994, the Public Integrity Division of the United States Department of Justice indicted former White House Travel Office Director Billy R. Dale on one charge of embezzlement and one charge of conversion.

The Committee conducted interviews and gathered documents from various participants in the Travel Office matter on a voluntary basis throughout the spring and summer of 1995. White House document production, however, proved problematic and led to numerous meetings, correspondence and phone conversations with Clinton administration representatives in the White House Counsel's Office, the Department of Justice, the Department of the Treasury, and the General Accounting Office.

In the fall of 1995, Chairman Clinger scheduled the Committee's first-hearing on the White House Travel Office for October 24, 1995. The hearing focused on the accuracy and completeness of the five White Ho use Travel Office reports and to consider whether further hearings were required to address unanswered issues. The panel at the October 24, 1995, hearing included authors of each of the five reports, respectively. This hearing purposely avoided all areas that might have impacted upon the trial of former Travel Office Director Billy R. Dale which was to commence on October 16, 1995.

The Committee reviewed which of seven key Travel Office issues each report addressed. These issues were: the completeness of the review of references to "Highest Levels" involvement at the White House in the Travel Office firings; whether any assessment of White House Standards of Conduct was performed and whether Administration staffers had violated those standards; whether inquiries were made into the role of Hollywood producer Harry Thomason in the firings; the role of Mr. Thomason and his firm, TRM, Incorporated in seeking contracts involving the Interagency Committee on Aviation Policy ("ICAP"); whether the issue of competitive bidding by the White House Travel Office and by the White House itself in dealing with the Travel Office was reviewed; and whether thorough investigations into FBI and IRS actions and reactions to the White House inquiries had been undertaken.

The hearing made clear that, given limitations on their scopes and limited access to documents and witnesses, none of the reports fully addressed the issues raised by the Travel Office firings. The redactions to the Treasury

Inspector General IRS report made it impossible to determine whether the IRS addressed any of the seven issues. The OPR and FBI reports only partially addressed two issues -- "FBI actions" and references to "Highest Levels of the White House" -- and never addressed the other five. Despite its far greater understanding of the participants and circumstances leading to the Travel Office firings -- or arguably because of it the White House Travel Office Management Review only briefly and superficially addressed Harry Thomason's role, FBI actions and references to "Highest Levels" of the White House while ignoring competitive bidding, IRS action, standards of conduct and ICAP contracts. Similarly, the GAO relied on the White House Management Review in its report on Mr. Thomason's role and only partially addressed FBI actions and "Highest Levels" while leaving ICAP, competitive bidding and standards of conduct unaddressed. IRS disclosure laws prevented the GAO from publicly addressing IRS actions.

The October 24, 1995, hearing also made clear that the GAO and OPR reports were hobbled by what their respective authors referred to as an unprecedented lack of cooperation by the White House in their investigations. It was determined in the hearing that the White House had denied both GAO and OPR documents which were critical to their investigations. Both GAO and OPR never received many of the documents subsequently produced by the White House to this Committee.

The criminal trial of former Travel Office Director Billy R. Dale began on October 26, 1995, and concluded on November 17, 1995, with Mr. Dale's acquittal of one charge each of embezzlement and conversion after just two hours of jury deliberations. After the acquittal was announced, Chairman Clinger requested that the Public Integrity Section of the Department of Justice turn over all documents related to the criminal prosecution for review by the Committee.

At year-end 1995, the Committee planned hearings on: the role of Mr. David Watkins in the Travel Office firings; the experiences of the seven fired Travel Office employees; the role of Mr. Harry Thomason; and the role of the FBI and IRS. In January 1996, the Committee subpoenaed all of Mr. Thomason's documents related to the Travel Office and filed a "6103 Waiver" with the IRS in which representatives of UltrAir authorized the IRS, Department of Treasury and others to release all relevant documents concerning the IRS audit of UltrAir in the wake of the Travel Office firings. The Department of the Treasury promised prompt delivery of all documents pending receipt of the expanded 6103 waiver.

At 8:30 p.m. on January 3, 1996, the White House delivered a document production to Committee offices. Included in that production was a 9-page, undated draft memorandum written by David Watkins, a copy of which was simultaneously released to the media. Mr. Watkins wrote in this memorandum, which he characterized as a "soul cleansing" memorandum, that he had made his "first attempt to be sure the record is straight, something I have not done in previous conversations with investigators -- where I have been as vague and protective as possible." The Watkins draft memo ascribed a far greater Travel Office role to First Lady Hillary Rodham Clinton than the White House or Mrs. Clinton ever had admitted: "On Monday morning you ["On Monday morning you [then-White House Chief of Staff McLarty] came to my office and met with me and Patsy Thomasson. At that meeting you explained that this was on the First Lady's 'radar screen." I explained to you that I had decided to terminate the Travel Office employees and you expressed relief that we were finally going to take action (to resolve the situation in conformity with the First Lady's

wishes). We both knew there would be hell to pay if, after our failure in the Secret Service situation earlier, we failed to take swift and decisive action in conformity with the First Lady's wishes."

Mr. Watkins concluded that his memo: "["[Made] clear that the Travel Office incident was driven by pressures for action originating outside my Office. If I thought I could have resisted those pressures, undertaken more considered action, and remained in the White House, I certainly would have done so. But after the Secret Service incident, it was made clear that I must more forcefully and immediately follow the direction of the First Family. I was convinced that failure to take immediate action in this case would have been directly contrary to the wishes of the First Lady, something that would not have been tolerated in light of the Secret Service incident earlier in the year."

The Watkins draft memorandum was responsive to the September, 1995, document request by the Committee. Moreover, back in October, 1995, the White House Counsel's Office had informed the Committee that it had produced most of the substantive documents pursuant to that request.

The White House explained weeks afterwards that it first discovered the Watkins draft memorandum on December 29, 1995. The memorandum was reviewed by the White House Counsel's office and copied to several Administration officials as well as the personal attorneys for Mack McLarty, Patsy Thomasson, Harry Thomason, and the President and First Lady by January 2, 1996. The White House released the Watkins draft memorandum to the media on the evening of January 3, 1996, at the same time it released the documents to the Committee.

On January 5, 1996, Chairman Clinger issued subpoenas to both David Watkins and Harry Thomason for all records concerning the White House Travel Office and related matters. On January II, 1996, Chairman Clinger issued interrogatories concerning the origin and chain-of-custody of the original and all copies of the Watkins draft memorandum to be answered in writing and under oath by

Jane C. Sherburne, Special Counsel to the President

Jon Yarowsky, Associate Counsel to the President

Natalie Williams, Associate Counsel to the President

Miriam R. Nimetz, Associate Counsel to the President

Christopher D. Cerf, Associate Counsel to the President

Nelson Cunningham, General Counsel, Office of Administration

Patsy Thomasson, Deputy Director of White House Personnel

Also on January II, 1996, the Committee issued bipartisan subpoenas for all relevant records to the White House Executive Office of the President and the White House Office of Administration as well as bipartisan personal subpoenas to Mack McLarty, Bruce Lindsey, Todd Stem, Patsy Thomasson, Catherine Cornelius and Margaret Williams. The documents subpoenaed were due on January 22, 1996.

In the wake of the White House's release of the Watkins draft memorandum, Clinton officials, attorneys and surrogates launched attacks on the character

and managerial skills of former Travel Office Director Billy Dale. First Lady Hillary Rodham Clinton also assailed Mr. Dale's management in various interviews. As a result, Chairman, Clinger wrote President Clinton on January 16, 1996, requesting that the White House cease its continued attack on Mr. Dale.

On January 17, 1996, the Committee held its second hearing on the Travel Office matter. David Watkins was the sole witness at this hearing, at which he requested that no still or video cameras be allowed to record his testimony, invoking a House rule. In the hearing, he testified under oath regarding his draft memorandum and other records he had turned over to the Committee pursuant to a personal subpoena. Watkins testified, "Was there pressure? Did I feel pressure of the desires and wishes of others? Yes, I did." Watkins testified he had felt, "a lot of internal pressure," and was asked by whom. He answered: "The President and First Lady." He also testified: "The pressure that I felt was coming from the First Lady was conveyed primarily through Harry Thomason and Vince Foster." Mr. Watkins' May 12, 1993, notes, first received by the Committee under personal subpoena, stated that Harry Thomason told him on that day that the First Lady wanted the Travel Office staff fired that day. In a May 14, 1993, telephone call to the First Lady, Watkins testified, he was told, "We should get our people in and get those people out."

In the wake of the discovery of the Watkins' memorandum where inconsistencies between Mr. Watkins' statements to the GAO and his undated memorandum and contemporaneous notes became clear, Chairman Clinger asked GAO to advise the Committee concerning what sanctions exist for intentionally providing false information to GAO. GAO responded in a letter dated January 17, 1996, which addressed the relevant statutes and legal precedents. In a January 23, 1996, response to GAO, Chairman Clinger asked that GAO compare and contrast the notes of its interviews with Mr. Watkins with copies of interviews conducted with Mr. Watkins by various investigative agencies, Mr. Watkins' draft memorandum and contemporaneous notes and other materials. Chairman Clinger asked that GAO identify all of the material inconsistencies between the documents provided and GAO's own interview notes and to determine whether they met the materiality test required by any applicable statute.

The seven fired Travel Office employees testified on January 24, 1996, when the Committee held its third hearing on the White House Travel Office firings. The seven fired Travel Office employees testified about their work in the White House Travel Office and the management of press charters, the events leading to their firings on May 19, 1993, and their investigation at the hands of the FBI and IRS. Individually, they testified of the costs of their respective legal defenses which, all told, amounted to some $ 700,000.

While all seven acknowledged that they served at the pleasure of the President, they questioned the manner in which the firings were undertaken. Mr. Dale testified: "If the President or the First Lady or anyone else wanted us out in order to give the business to their friends and supporters, that was their privilege. But why can't they just admit that is what they wanted to do rather than continue to make up accusations to hide that fact?"

Mr. Billy Dale testified in the hearing that records disappeared from the Travel Office in the period immediately preceding the firings and disputed allegations of Travel Office mismanagement as a "convenient excuse" intended to justify the firings. Five of the Travel Office employees testified about

being placed on administrative leave within a week of the firings and subsequently finding employment elsewhere in the federal government. Mr. Dale and former White House Travel Office Deputy Director Gary Wright had retired from federal service in the aftermath of the firings in 1993.

In a letter to the Committee dated January 23, 1996, Mr. David L. Clark, Director of Audit Oversight and Liaison for the General Accounting Office, evaluated current White House Travel Office management using the 29 criteria identified in its May 1994, report on the Travel Office. The evaluation was based on work performed by GAO in the Travel Office in the fall of 1995. GAO stated: "We found that the Travel Office had developed policies and implemented procedures during the period January 1995 through August 1995 to address all but 3 of the 29 criteria. For those three, we found that the Travel Office had not (1) billed customers within its stated 15-day requirement, (2) paid vendors within its stated 45-day requirement, and (3) performed bank reconciliations regularly."

GAO also reported: "["[T]he Travel Office had a policy requiring monthly reconciliations of its checkbook with the cash balance reported by its bank. As of April 1994, we found that staff were performing the reconciliations as required. However, from January 1995 through August 1995, Travel Office staff performed no bank reconciliations because other tasks were given a higher priority. Immediately prior to our review, the Travel Office reconciled all outstanding bank statements and found deposits totaling $ 200,000 that had not been entered into its checkbook. These funds were all owed to vendors who had previously furnished goods and services for press trips. White House officials informed us that future monthly reconciliations will be performed as required."

GAO's discovery of a $ 200,000 discrepancy in White House Travel Office deposits for calendar year 1995 is a matter of some concern given that the White House alleged in May, 1993, that it had fired the entire Travel Office staff and launched an FBI criminal investigation on the basis of a $ 18,200 discrepancy in Travel Office petty cash funds.

On January 30, 1996. General Counsel Robert P. Murphy of the General Accounting Office wrote Chairman Clinger addressing inconsistencies between statements made by David Watkins to GAO and Watkins' undated draft memorandum and notes taken by Watkins which were dated May 31, 1993, and Watkins' GAO interview and other relevant documents.

On February 1, 1996, Chairman Clinger and Senate Judiciary Committee Chairman Orrin Hatch (R-UT) introduced a bill to reimburse the legal expenses of the seven fired White House Travel Office employees. The bill would reimburse nearly $ 500,000 spent by Mr. Billy Dale on his defense as well as the Travel Office expenses still due by his six colleagues. In a 1994 appropriation, Congress previously reimbursed $ 150,000 in their legal expenses.

On February 7, 1996, the Committee issued additional bipartisan personal subpoenas to a number of current and former White House employees, volunteers, friends and others involved in the Travel Office matter, including Matt Moore.

On February 13, 1996, following consultation with Chairman Clinger, the GAO asked Federal prosecutors to investigate possible false statements made to GAO by David Watkins, having concluded that statements made or attributed to Mr. Watkins were inconsistent with statements he made in his GAO interview.

Justice Department officials submitted the referral to the Independent Counsel and asked the court to approve an expansion of the scope of Independent Counsel Kenneth Starr to include this referral.

The Government Reform and Oversight Committee submitted a list of 26 interrogatories to First Lady Hillary Rodham Clinton on February 15, 1996. These interrogatories were to be answered in writing and under oath by the First Lady by February 29, 1996. The White House subsequently asked for an extension and the Chairman of the Committee on Government Reform and Oversight agreed to a three-week extension. The White House provided the First Lady's sworn responses to the Committee on the second due date, March 21, 1996. Her responses were released to the media at the same time. In the responses, the First Lady insisted she had no decision-making role in the Travel Office firings and that her statements to GAO were accurate. As to conversations with Harry Thomason, Vince Foster and David Watkins, the First Lady had very few specific recollections.

Chairman Clinger submitted H. Res. 369, which was referred to the Committee on Rules, on February 29, 1996. H. Res. 369 provided special authority to the Committee On Government Reform and Oversight to obtain testimony for purposes of investigation and study of the White House Travel Office matter. The bill was limited, deliberately, to provide deposition authority to the Committee on Government Reform and Oversight only for its investigation of the Travel Office matter. Deposition authority allowed the Committee to obtain sworn testimony from witnesses while minimizing the number of hearings needed in order to complete the investigation.[to complete the investigation.[18] [[18] Precedents for such deposition authority have included: 1) President Nixon Impeachment Proceedings (93rd Congress, 1974, H-Res. 803); 2) Assassinations Investigation (95th Congress, 1977, H.Res. 222); 3) Koreagate (95th Congress, 1977, H.Res. 252 and H.Res. 752); 4) Abscam (97th Congress, 198 1, H.Res. 67); 5) Iran-Contra (100th Congress, 1987, H.Res. 12); 6) Judge Hastings Impeachment Proceedings (100th Congress, 1987, H.Res. 320); 7) Judge Nixon-Impeachment Proceedings (100th Congress, 1988, H.Res. 562); and 8) October Surprise (102nd Congress, 1991, H.Res. 258).

The House approved H.Res. 369 on March 7, 1996. Thereupon, the Committee on Government Reform and Oversight notified witnesses it wished to testify under oath before the Committee. Depositions commenced in late March, 1996, and are expected to be completed by June,1996.

The White House made a March 15, 1996, production of documents pursuant to the Committee's January 11, 1996, subpoena. That production contained yet another unproduced May 3, 1994, handwritten letter from David Watkins to Mrs. Clinton. No explanation for the White House's failure to produce this document for nearly two years during the course of numerous other document requests and subpoenas was proffered until two requests for a chain-of-custody were made. Mr. Quinn finally responded on April 5, 1996, stating only that the letter was located in a stack of unsorted, miscellaneous papers and memorabilia in the Office of Personal Correspondence having been for- warded to Carolyn Huber from the First Lady. Ms. Huber forwarded the original letter to the First Lady on March 4, 1996. Mr. Quinn stated that Mrs. Clinton did not look at the letter until March 12, 1996, at which time she immediately sent the only copy of the White House document to her personal lawyer, David Kendall. Mr. Kendall reviewed the original and returned a copy, and later the original, to Special White House Counsel Jane Sherburne.

On March 22, 1996, the three-judge federal appeals panel which appointed Kenneth W. Starr Whitewater Independent Counsel approved an expansion of Independent Counsel Starr's Mandate to include the issue of whether Mr. David Watkins lied about First Lady Hillary Rodham Clinton's role in the Travel Office firings and related matters. Attorney General Janet Reno referred the Watkins matter to the three- judge panel after the Justice Department had concluded that Watkins could be investigated by an independent counsel.

By a note of 350 to 43 on March 19, 1993, the House of Representatives passed H.R. 2937, a bill to reimburse the legal expenses and related fees incurred by former employees of the White House Travel Office with respect to the termination of their employment in that office on May 19, 1993.

In document productions from individuals subpoenaed, the Committee was provided with a copy of a February 15, 1996, White House Memorandum from John M. Quinn, Counsel to the President and Jane C. Sherburne, Special Counsel to the President, to a witness who had been subpoenaed by the Committee on Government Reform and Oversight to provide all records related to the White House Travel Office matter in the witness' possession to the Committee. The memorandum from Mr. Quinn and Ms. Sherburne stated, in part: "Last week, the Committee ["Last week, the Committee [on Government Reform and Oversight] issued personal subpoenas to you and other current and former White House employees. These personal subpoenas call for personal as well as White House records. The Counsel's Office will handle production of your responsive While House records, i.e., records created or obtained during the course of your official duties. Accordingly, you should forward any White House records you believe may be responsive to the Counsel's Office and we will determine whether they should be produced to the Committee. You should provide any responsive personal records directly to the Committee." [records directly to the Committee." [Emphasis in original.]

The existence of the February 15, 1996, memorandum from Mr. Quinn and Ms. Sherburne greatly concerns the Committee because the February 7, 1996, subpoenas served were personal subpoenas. Those subpoenaed to provide all relevant White House Travel Office records in their possession remain personally responsible for making a complete production, whether or not the White House chooses to withhold any or all of their documents from production to the Committee. Given the White House's continuing unwillingness's to make a complete production of records it has been subpoenaed to provide the Committee, its instructions in the February 15, 1996, memo by Mr. Quinn and Ms. Sherburne to witnesses served personal subpoenas, suggests that the White House intends to play an intermediary role in the case of current and former White House staffers, volunteers and others in a manner which may lead to their being held personally liable for a failure to produce all relevant records.

In the wake of its discovery of the February 15, 1996, memorandum by Mr. Quinn and Ms. Sherburne, the Committee wrote letters to each individual who had been issued a personal subpoena informing them that all records responsive to the Committee's January and February 1996, subpoenas must be produced by May 8, 1996. Chairman Clinger sent similar letters to White House Counsel Quinn and Attorney General Reno informing them that all records responsive to White House and Justice Department subpoenas were to be produced by May 8, 1996.

Chairman Clinger also announced on May 2, 1996, that he had scheduled a Committee business meeting for Thursday, May 9, 1996, at 9 a.m. to consider a

privileged resolution to compel production of any subpoenaed records relating to the White House Travel Office which were not provided to the Committee by May 8, 1996.

WHITE HOUSE HISTORY OF STONEWALLING

The White House response to the several investigations into the White House Travel Office matter has been a history of three years of stonewalling. Despite a GAO investigation which was-mandated by law -- a law which President Clinton himself signed, an OPR investigation conducted by the President's own political appointee, and criminal investigations conducted by the Justice Department; the White House has continued to withhold documents relating to Travelgate. An abbreviated history of the stonewalling follows.

A. GAO Investigation

On July 2, 1993, a law was signed by the President which included a provision mandating the GAO review of the Travel Office. The report originally was to be completed by September 30, 1993, but due in part to numerous White House delays, interviews were not completed until March 1994 and the report finished in May 1994. Last fall, a GAO representative testified before this Committee that the measure of cooperation received from the White House was less than optimal. She further testified that not all documents were provided to GAO by the White House.[White House.[19] Indeed, the White House denied GAO responsive documents that only came to light after this Committee began its investigation. The following is an overview of White House delays in document production with GAO:

* While the Justice Department did not object to the White House interviewing Catherine Cornelius, David Watkins, and a number of other employees in the course of the White House Management Review despite the fact that there was an ongoing criminal investigation, the Justice Department did delay and/or prevent GAO from completing some of its interviews.

* GAO experienced months of delays while seeking documents regarding the Travel Office matter and ultimately did not receive all relevant documents pursuant to its document requests. The White House Counsel's Office worked to narrow the scope of GAO document requests throughout that period.

* As a result of the narrowed document requests, the White House failed to provide the Vince Foster Travel Office file (which White House Counsel Bernard Nussbaum kept in his office following Mr. Foster's death), and the White House failed to provide the White House Management Review interview notes.

* Even the narrowed request however, does not explain why the White House failed to provide the Watkins "soul cleansing memo. David Watkins, Matt Moore and Patsy Thomasson all had copies of the memo and all were made aware of the various document requests and subpoenas. Matt Moore himself was involved in the process of producing documents.

* White House failed to provide any documents related to the efforts by Harry Thomason and Darnell Martens to obtain GSA contracts for their company, TRM.

* GAO noted that the level of cooperation that it received from the White House was not conducive to properly conducting its work. [[19] GAO official Nancy Kingsbury testified before the Committee on October 24, 1995, "As a

practical matter, we depend on and usually receive the candor and cooperation of agency officials and other involved parties and access to all their records. In candor, I can't say that there has been quite as generous an outpouring of cooperation in this case as might have been desirable." See, White House Travel Office -- Day One, Hearings before the House Committee on Government Reform and Oversight, 104th. Cong., 2d Sess., January 24, 1986.

B. OPR Investigation

On July 15, 1993, Deputy Attorney General Phillip Heymann called on the Justice Department's Office of Professional Responsibility (OPR) to conduct a review of the FBI's role in the Travel Office firings. Later, after Vincent Foster's death and the discovery of his "suicide note," Mr. Heymann added to the investigation a review of the comments in Vincent Foster's note which mentioned that the "FBI lied."

This OPR investigation was ordered after President Clinton himself wrote to the then Chairman of the Judiciary Committee that his Administration would cooperate with any Justice Department investigation. As discussed supra, OPR Counsel Michael Shaheen later wrote that he was "stunned" by the documents withheld from his inquiry and did not believe the White House officials he dealt with were cooperative.

The following is an overview of the White House delays and denials in responding to the Office of Professional Responsibility investigation:

* White House failed to provide the Vince Foster Travel Office file. OPR Counsel Michael Shaheen wrote a scathing memo in July 1995 about not receiving this document for OPR's investigation. Mr. Shaheen wrote: "we were stunned to learn of the existence of this document since it so obviously bears directly upon the inquiry we were directed to undertake in late July and August 1993

* The White House only provided the White House Management Review notes from the interview with Vincent Foster to OPR. OPR had asked for all of the interview notes. Mr. Shaheen wrote: "The White House declined to provide the notes and failed to mention the existence of any handwritten notes by Mr. Foster on the subject."

* Mr. Shaheen also stated in his memo: "we believe that our repeated requests to White House personnel and counsel for any information that could shed light on Mr. Foster's statement regarding the FBI clearly covered the notebook [the Vince Foster Travel Office notebook] and that even a minimum level of cooperation by the White House should have resulted in its disclosure to us at the outset of our investigation."

* Shaheen noted that the Vince Foster Travel Office notebook also had been withheld from the Independent Counsel.

* Mr. Shaheen and members of his staff informed Committee Counsel in an interview that by December, 1993, OPR was considering going to the Attorney General to request a full investigation into the Travel Office matter because of the "very dangerous signals" sent to the investigators which indicated possible obstruction of its investigation. Shaheen and his investigators noted that the memories of White House witnesses were very vague and this was only several months after the events in question. Mr. Shaheen's investigation was cut

short by the appointment of the Independent Counsel.

C. Justice Department, Public Integrity Section

In May, 1993, the Public Integrity Section of the U.S. Department of Justice began a criminal investigation into the Travel Office matter and shortly thereafter began an investigation into the roles of Harry Thomason and Darnell Martens at the White House.

In the course of the Public Integrity Section's investigation, the White House engaged in the extraordinary step of withholding documents from its own Justice Department which was, at the time, conducting a criminal investigation into the actions of presidential friend Harry Thomason as well as a criminal investigation of Billy Dale. The Clinton White House foot-dragging with Justice Department prosecutors caused Clinton appointee and head of the Public Integrity Section, Lee Radek, to write in an internal memo: "At this point we are not confident that the White House has produced to us all documents in its possession relating to the Thomason allegations ... [Thomason allegations ... [T]he White House's incomplete production greatly concerns us because the integrity of our review is entirely dependent upon securing all relevant documents."

The following is an overview of White House delays and denials in dealing with the investigation of the Justice Department's Public Integrity Section.

* July of 1993: the Department of Justice began trying to get an interview with Harry Thomason while Thomason's lawyer began trying to get access to the White House Management Review interview notes of Harry Thomason.

* Summer of 1993: Public Integrity began seeking documents from the White House in the summer of 1993 but received little information. As of September 30, 1993, Prosecutor Goldberg wrote to the White House "to confirm that the White House had only located two documents related to Harry Thomason."

* October 12, 1993: White House Counsel sent an agreement which would allow Public Integrity prosecutor Goldberg to "view" two Harry Thomason memos.

* November 12, 1993: Goldberg signed an agreement to view two Harry Thomason "White House project" memos but not take any notes or make copies. At this point, almost six months after the firings and six months after the initiation of an investigation into Travel Office related matters, no one at the White House appears to have mentioned the GSA/ICAP contracts Harry Thomason and Darnell Martens generated while seeking business for their company, TPM.

* January 1994 - Spring of 1994: Public Integrity continued to seek documents about Harry Thomason's activities at the White House and received its first ICAP/GSA contract documents regarding efforts by Harry Thomason and Darnell Martens to seek government contracts.

* March 14, 1994: Public Integrity wrote to White House Counsel Eggleston asking for confirmation in writing that the White House had searched for all Harry Thomason files.

* April 5, 1994: Neil Eggleston distributed a memo to gather all Harry Thomason and Darnell Martens documents by April 7, 1994. It requires a signed

certification stating: "I have searched my files and I have no documents responsive to the requests set forth in this memorandum."

* April 5, 1994: An FBI e-mail on this date titled: "WHTO Update" states: "there has been some problem in obtaining records from the White House regarding Thomason's duties and responsibilities. Goldberg is considering issuing a subpoena ..."

* Spring 1994: Production of Harry Thomason documents to Public Integrity continues. Matt Moore and Neil Eggleston were involved in document production. (Matt Moore possessed copies of the Watkins memos that never were turned over.)

* May 11, 1994: Neil Eggleston, Joel Klein and Marvin Krisloy (all in the White House Counsel's office) wrote a letter to the Independent Counsel addressing how the White House would comply with the Independent Counsel's grand jury subpoena. (Their letter narrowed the scope of the Independent Counsel's initial request.)

* Sometime in May, 1994: Eggleston reviews the Foster Travel Office file to determine if it is responsive to the Special Counsel Robert Special Counsel Robert Fiske subpoena. He decides that it is not. Eggleston apparently ignores the fact that the Foster Travel Office file, which mentions Harry Thomason and Darnell Martens throughout, is responsive to the Public Integrity document requests.

* June 24, 1993: Neil Eggleston writes a letter to Stuart Goldberg informing him that Public Integrity has all of the Harry Thomason documents as of this date. (Vince Foster Travel Office file is not included.)

* July 10, 1994: Neil Eggleston writes a memo to Lloyd Cutler about the Vince Foster Travel Office file and why it wasn't produced to any investigation to date. Eggleston recommends producing only portions of the Foster notebook to Public Integrity by that Tuesday (July 12, 1994). Those portions are not provided until one month later.

* August 19, 1994: Neil Eggleston provides the additional documents from Foster's Travel Office notebook to Public Integrity (approximately 20 pages of the 100-plus page document are provided.).

* August 30, 1994: Public Integrity prosecutor Goldberg writes the White House to ask why Harry Thomason documents were withheld and asks for an explanation by September 8, 1994.

* September 8, 1994: Neil Eggleston writes Goldberg explaining why he failed to turn over all of the Harry Thomason documents saying "I sincerely apologize for the oversight and hope that the delay in production of these documents has not caused you any inconvenience ... please be advised that I have resigned effective September 8, 1994."

* September 8, 1994: Public Integrity Chief Lee Radek writes a memo to Jack Keeney stating: "At this point we are not confident that the White House has' reduced to us all documents in its possession relating to the Thomason allegations ... the White House's incomplete production greatly concerns us because the integrity of our review is entirely dependent upon securing all relevant documents."

* September 13, 1994: A Grand Jury subpoena for documents from the White House relating to Harry Thomason and Darnell Martens is served on the White House with a September 30, 1994, due date.

* September 30, 1994: All Harry Thomason and Darnell Martens records pursuant to the September 13, 1994, subpoena are due to the Grand Jury. The White House produced a "PRIVILEGE LOG" which identifies more than 120 documents that the White House refuses to turn over to its own Justice Department in the course of a criminal investigation involving activities at the White House.

* July 6, 1995: White House provides complete Vince Foster Travel Office file to the press.

* July 28, 1995: White House, in responding to Public Integrity prosecutor Goldberg, sends more pages of Vince Foster Travel Office notebook.

* August 17, 1995: Public Integrity prosecutor Goldberg reviews more Vince Foster documents at the White House with White House Associate Counsel Natalie Williams.

* November 4, 1995: In the midst of the Billy Dale trial, a White House Associate Counsel taxes a memo on the Travel Office files that is dated 5/21/93. The memo was from a member of the White House Records Management staff who expressed concerns about the handling of the documents in the Travel Office after the firings. The memo had not been provided previously to Public Integrity or to defendant Billy Dale, whose criminal trial was under way.

* November 6, 1995: The White House sends additional unknown documents to Public Integrity prosecutor Goldberg.

In summary, it took the White House nearly six months to allow Public Integrity prosecutors to see any documents related to Harry Thomason and nearly a year to provide most of the ICAP/GSA documents. The White House failed to provide the Vince Foster Travel Office file in its entirety until July, 1995, after it released the file to the press. Portions of the file had been provided to Public Integrity in August, 1994. A September, 1994, subpoenaing failed to produce this document in its entirety.

The White House also failed to provide the Watkins "soul cleansing memo" which was in Patsy Thomasson's files despite numerous document requests and the September, 1994, subpoena. At the very least, David Watkins, Matt Moore and Patsy Thomasson were aware of the existence of this document throughout the course of document requests.

Even after the September, 1994, subpoena from Public Integrity, the White House produced a privilege log of 120-plus documents it refused to provide to its own Justice Department in the course of a criminal investigation. White House production of documents to Public Integrity continued throughout the course of the Billy Dale trial in October-November, 1995. Since these documents belatedly were provided to Public Integrity, they also belatedly were provided to the defendant during his trial instead of before the trial began. Public Integrity does not appear to have sought documents directly from Harry Thomason until after the Billy Dale trial ended and after both the Committee on Government Reform and Oversight and the Independent Counsel had sought documents from Mr. Thomason and Mr. Martens. New -- never before known of -- documents

regarding efforts by Mr. Thomason and Mr. Martens to seek business for TRM were included in these productions to the Justice Department after Billy Dale's trial.

Public Integrity's tolerance of White House foot-dragging was in stark contrast to the aggressive pursuit of Billy Dale and his family throughout the course of the criminal investigation of Mr. Dale.

D. Committee Investigation

1. Ranking Member Clinger's efforts in the Minority, 1993-94:

On June 16, 1993, Ranking Minority Member Bill Clinger joined House Republican leadership in requesting documents and answers to questions regarding the Travel Office. No substantive response ever was provided.

* August 6, 1993: Chairman Clinger joins Republican leadership in requesting information on the IRS investigation and other Travel Office questions. (No substantive response ever was provided.)

* October 15, 1993: Chairman Clinger writes Bernard Nussbaum concerning the status of Harry Thomason as a special government employee. (No substantive response ever was provided.)

* September 13, 1994: Chairman Clinger requests that the White House provide access to GAO documents maintained at the White House. (Request never provided - later memo shows White House Counsel Neil Eggleston recommended turning down the request after the Appropriations bill for the White House had passed.)

* September 20, 1994: Chairman Clinger again requests to review GAO documents at the White House.

* October 1994: Chairman Clinger issues a report analyzing the GAO report on the Travel Office and calling for hearings on the discrepancies in the GAO work papers versus the actual report and other various outstanding issues.

2. Chairman Clinger's Efforts in the Majority, 1995 - Present,

Once elected Chairman of the new Committee on Government Reform and Oversight, Chairman Clinger announced that he would continue the Committee's investigation into the White House Travel Office matter. On June 14, 1995, the Committee makes first document request to White House focusing on the White House Management Review docwnents and documents related to all of Harry Thomason's activities.

* Throughout June and July, 1995, White House fails to produce any documents and requests that the Committee hire security guards to protect any documents provided to the Committee.

* July 18, 1995: White House produces the Vince Foster Travel Office file several weeks after providing it to the press.

* August 2, 1995: White House produces documents, 90% of which previously have been made publicly available (i.e. White House Management Review copies, GAO report copies, press conference transcripts).

* August 9, 1995: White House produces more copies of the Management Review from various files and several miscellaneous documents.

* August 28, 1995: White House produces miscellaneous hand- written notes by White House employees.

* September 5, 1995: White House produces a privilege log identifying 900 pages of documents from the White House Management Review.

* September 13, 1995: After negative press reaction to White House privilege log, the White House produces approximately 400 pages of interview notes from the 900 pages of Management Review documents.

* September 18, 1995: White House produces Bruce Lindsey documents regarding efforts by Harry Thomason and Darnell Martens to obtain GSA consulting contracts for their business, TRM. These documents had not been identified previously as documents that were being withheld in the privilege log. (On this same day, Harry Thomason cancels a previously scheduled interview with Committee staff.)

On September 18, 1995, the Committee makes a second document request to White House requesting all White House Travel Office documents from all of the various investigations.

* September 25, 1995: White House produces more notes from the White House Management Review.

* September 28, 1995: White House produces more documents from Bruce Lindsey's office, Counsel's office and Office of Administration.

* October 4, 1995: White House produces additional White House Management Review documents.

* October 5, 1995: White House produces documents from Neil Eggleston and Bill Kennedy.

* October 13, 1995: White House produces documents from Counsel's office, Office of Administration and Records Management.

* October 7, 1995: White House produces documents from Cliff Sloan, Neil Eggleston and various White House Management Review files.

* October 24, 1995: Committee holds first hearing on the Travel Office matter.

* October 26, 1995: Billy Dale embezzlement trial begins.

* November 14,1995: White House produces more White House Management Review documents, including lengthy chronologies and drafts, but still does not provide the legal anal vsis prepared by Beth Nolan concerning Harry Thomason's status as a special government employee (staff is allowed to review).

* November 16, 1995: Billy Dale acquitted.

* December 19, 1995: White House Counsel sends out memo to all staff to respond to Committee document requests.

* December 22, 1995: White House produces more documents from Joel Klein, Office of Records Management, Cliff Sloan, Patsy Thomasson and Counsel's office.

* December 29, 1995: Watkins memo allegedly found at White House.

* January 3, 1996: White House produces more documents from various White House offices. Watkins memo is produced.

On January 5, 1996, the Committee issues bipartisan subpoenas to David Watkins and Harry Thomason for all documents. On January II, 1996, the Committee issues bipartisan subpoenas to the White House for all outstanding documents and to six individuals at White House. Responsive documents are due to the Committee on January 22, 1996.

* January 22, 1996: White House produces documents from Counsel's office, Chief of Staff s office, Office of Administration and other offices.

* January 29, 1996: White House produces documents from miscellaneous files including those of Patsy Thomasson and Catherine Cornelius.

* February 1, 1996: White House Counsel sends out memo to all staff requesting all documents responsive to the January II, 1996 subpoena due on January 22, 1996.

* February 14, 1996: White House produces documents from various individual files.

On February 7, 1996, the Committee sends individual subpoenas to more than 25 present and former White House staff (due February 26, 1996). On February 15, 1996, the Committee issues interrogatories to the First Lady due on February 29, 1996. A subsequent request for an additional three weeks to respond was granted.

* February 15, 1996: White House distributes a memo to present and former staff, volunteers and others who received personal subpoenas requesting that they turn over their documents to the White House and stating that the White House in turn will produce relevant documents to the Committee.

* February 22, 1996: White House produces documents from various White House offices, including notes taken by a White House intern monitoring the Billy Dale trial and documents related to Billy Dale trial. White House represents, that responsive documents have been produced and this should complete production but that there are documents they believe are subject to privilege which they are withholding. No privilege log is provided.

* March 4, 1996: White House produces additional documents.

* March 8, 1996: White House produces documents from Cliff Sloan, Todd Stem, Matt Moore, Dee Dee Myers, Natalie Williams and Counsel's office.

* March 15, 1996: White House produces a small number of documents including a never before produced letter to the First Lady from David Watkins dated May 3, 1994 -- the day after the GAO Travel Office Report was issued.

* March 21, 1996: First Lady provides responses to Committee's interrogatories regarding the Travel Office.

* April 1, 1996: White House produces additional documents including the first e-mail produced by the White House.

* April 2, 1996: White House produces additional documents from Cliff Sloan's records and Office of Personal Correspondence.

* April 18, 1996: White House produces documents from Dee Dee Myers that were left out of earlier productions (documents are notes from May, 1993, concerning the Travel Office).

* April 24, 1996: White House produces several pages of additional documents from Tom Castleton, David Watkins and Information & Systems Technology.

* May 9, 1996, White House continues to withhold documents related to the Travel Office matter. The Committee votes to hold Messrs. Quinn, Watkins and Moore in contempt of Congress.

INVOCATION OF PRIVILEGES

A. Assertion of Executive Privilege

1. Background

As has been fully recounted above, the Committee's investigation of the Travel Office firings has been prolonged, and essentially thwarted, by the tactics of delay, obfuscation, and deliberate obstruction by the White House, and in particular by the custodian of the documents sought, White House Counsel John M. Quinn. Following failures to supply documents responsive to its written requests of June 14, and September 18, 1995, and the belated discovery of the Watkins memo on December 29, 1995, the Committee, with full bipartisan concurrence, issued subpoenas duces tecum to David Watkins on January 5, 1996, Mr. John Quinn on January 11, 1996,[5, 1996, Mr. John Quinn on January 11, 1996,[20] and to Matthew Moore on February 6, 1996, with return dates of January 11, 1996, January 22, 1996, and February 26, respectively.

A protracted process of attempted accommodation ensued which resulted in the discovery of previously requested or subpoenaed material amongst the production of various groupings of theretofore withheld documents. A rolling production of records ensued which continued sporadically for more than three months with no plausible explanation as to why documents were not found and produced earlier, and without any agreement as to a definitive-timetable for the completion of the document production. Indeed, the White House throughout this period continually refused to supply the Committee with either an index of the documents being withheld or a privilege log specifically identifying documents for which presidential privilege was being claimed. The White House Counsel's Office also intervened with individuals with records subpoenaed by the Committee to have them send documents in their possession to the White House rather than directly to the Committee. [[20] The subpoena was directed to the "Custodian of Records, Executive Office of the President." White House Counsel John M. Quinn has acknowledged, through actions and words, that he is the custodian of the documents sought..

On May 2, 1996, Chairman Clinger advised White House Counsel Quinn, Attorney General Janet Reno, and former White House aides David Watkins and Matthew Moore that they were not in compliance with the subpoenas previously served on them, that the final return date for the covered material would be close of business May 8, 1996, and that a meeting of the full Committee was scheduled for 9:00 a.m. on May 9, 1996, at which time a vote on a resolution to cite them for contempt of Congress would be held if production of the records was not forthcoming. There followed a series of written and oral communications in which the White House adamantly refused to modify its stance of non-compliance or to supply an unequivocal constitutional basis for its position.

In a May 3 letter to Chairman Clinger, Mr. Quinn decried the threat of a contempt citation as an election season "political tactic." In a conversation between Mr. Quinn and Chairman Clinger on the morning of May 3, the Chairman informed Mr. Quinn that an impediment to the resolution of the dispute was the Committee's inability to understand the nature of the documents being withheld and suggested again that a privilege log be supplied. That evening Mr. Quinn responded with a telecopied letter to the Chairman broadly describing the categories of documents being withheld:

1. Documents relating to ongoing grand jury investigations by the Independent Counsel;

2. Documents created in connection with Congressional hearings concerning the Travel Office matter; and

3. Certain specific confidential internal White House Counsel Office documents, including "setting" notes, certain other counsel votes, memoranda which contain pure legal analysis, and personnel records which are of the type protected by the Privacy Act.

There was no indication that any of these documents involve communications to or from the President nor was there any specific claim of presidential privilege, only an allusion to the President's right to have the services of White House counsel who can operate with sufficient confidentiality to serve him.

Chairman Clinger responded by letter on May 6, explaining that the expansion of the Committee's investigation was the direct result of finding "significant evidence that the White House Counsel's Office was used to coordinate official responses to investigative bodies and, too often, deny investigative agencies with appropriate access to that information" which has raised serious questions "[whether these actions met the standards for improper, even criminal conduct." The Chairman also made it clear that his May 2 letter rejected an earlier (February 15, 1996) offer of limited access to certain documents conditioned on a surrender of the right of access to all other. documents, and reiterated the firmness of the May 8 return date. Mr. Quinn responded that same day expressing a desire to continue to work toward a compromise solution, and offered to discuss making available material related to the IRS and FBI inquiries.

The Chairman responded to this last communication the next day, May 7, expressing appreciation for the offer of the IRS and FBI records, but noting that the IRS document had been previously promised, and that with respect to the FBI records, it was the first time the Committee heard anything about the White House withholding FBI records. Mr. Clinger also invited the submission of a

written assertion of presidential executive privilege by 8:00 a.m., May 9, 1996, which would be transmitted to all members of the Committee.

On May 7, counsel for David Watkins submitted a legal memorandum claiming that drafts of the Watkins soul cleansing memo in the possession of Matthew Moore are protected by the attorney-client and work product privileges.

On May 8, Mr. Quinn, during a meeting with the Chairman and the Ranking Minority Member, transmitted to the Committee a memorandum from the Office of Legal Counsel, Department of Justice, suggesting that the scheduled vote on the criminal contempt citations be canceled and that legislation be passed vesting jurisdiction in a federal district court to resolve the subpoena compliance issue in a civil contempt proceeding before the court. In a response to the Ranking Minority Member dated that same day, the Chairman rejected the proposal as unreasonable, but advised that he would delay the filing of the Committee report on the contempt resolution to provide additional time for the White House to comply.

On the morning of May 9, Mr. Quinn wrote the Chairman expressing his view that the threat of criminal contempt is "Irresponsible" and "calculated not to find the truth but instead to make a political point." He asserted that the Committee's subpoenas were not "sufficiently specific... to establish the demonstrably critical showing that the courts require in order for an oversight Committee to overcome the executive branch's strong interest in confidential and candid communications. Instead, you have unilaterally determined that this President is not entitled to any confidential legal communications and, therefore, any defense." Mr. Quinn then informed the Chairman that the Attorney General had provided the President with an opinion that "executive privilege may be properly asserted with respect to the entire set of White House Counsel's Office documents currently being withheld from the Committee, pending a final Presidential decision on the matter," and that pursuant to that opinion the President had directed him to invoke executive privilege "as a protective matter" with respect to all the contested documents. The letter concluded with a request that any action with respect to the failure to comply with the subpoenas be held in abeyance pending the President's decision whether to claim privilege with respect to specific, individual documents.

By a vote of 27-19, the Committee on May 9 agreed to report a resolution of contempt of Messrs. Quinn, Watkins and Moore to the floor of the House.(floor of the House.[21] The Chairman announced, however, that he would delay transmitting the Committee report to the floor to allow further opportunity for resolution of the dispute. But as of the date of the transmittal of this report, there has been no meaningful movement toward accommodation by the White House nor has there been an official written assertion of executive privilege by the President pursuant to the procedures implemented by President Reagan on November 4, 1982, and adopted by President Clinton.

2. There Has Been No Effective Claim of Executive Privilege by

the President

In his May 2, 1996, letter to White House Counsel John M. Quinn, Chairman Clinger unequivocally set the close of business May 8 as the final return date for subpoena duces tecum issued on January II, 1996. The Chairman reiterated the finality of that closure date in his subsequent correspondence with Mr. Quinn

on May 6 and 7 and in a meeting with him on May 8. Mr. Quinn acknowledged his understanding of the due date and the consequences of noncompliance and made it clear in his letters of May 2 and 3 that his failure to comply would be intentional. Thus, as of the close of business on May 8, upon his failure to timely produce the subpoenaed documents admittedly in his custody and control, Mr. Quinn's contempt was complete.[custody and control, Mr. Quinn's contempt was complete.[22] [[21] Prior to the Committee meeting, the Department of Justice agreed to comply with demands for documents in its possession. The portion of the contempt resolution directed at Attorney General Reno therefore was dropped. [22 United States v. Bryan, 339 U.S. 323, 329-30 (1950) ("[[22] United States v. Bryan, 339 U.S. 323, 329-30 (1950) ("[W]hen the government introduced evidence in this case that respondent validly had been served with a lawful subpoena directing her to produce records within her custody and control, and that on the day set out in subpoena she intentionally failed to comply, it made a prima facie case of willful default.")

On May 7, Chairman Clinger invited Mr. Quinn to submit either a written statement setting forth valid claims of executive privilege or a written claim of executive privilege signed by the President by 8:00 a.m. May 9. Mr. Quinn accepted that invitation by a letter of that date that related the view of Attorney General Reno that the President presently could assert executive privilege for all the subject documents until such time as he made final decision on the matter. Mr. Quinn advised that he had been directed to inform the Committee that the President was invoking executive privilege "as a protective matter, with respect to all documents in the categories identified on page 3 " of the letter," until such time as the President, after consultation With the Attorney General, makes a final decision as to which specific documents require a claim of executive privilege." On the afternoon of May 9 the Committee voted to cite Mr. Quinn in contempt. The Chairman, however, agreed to delay transmission of the contempt report to the floor to allow for receipt of a further communication from the President on the matter of the privilege claim.

As of the date of the transmittal of this report, it has been several weeks since the invocation of the "protective" privilege claim, there still has been no compliance with the Committee's subpoena nor has there been an official presidential invocation of executive privilege pursuant to the procedures established by President Reagan on November 22, 1982, and adopted by President Clinton. Under those procedures, if designated officials', including the Attorney General, determine "that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the counsel to the President, who will advise the Department Head and the Attorney General of the President's decision." If the President decides to invoke the privilege, the decision is to be communicated to the congressional committee requesting the information that the claim is made with the specific approval of the President. In the past, Presidents in fact have executed and signed claims of privilege which have accompanied a detailed justification prepared by the subpoenaed official.

Under these circumstances, it is the belief of the Committee that it has waited a respectful period of time for receipt of the appropriate presidential claim. The self-imposed procedures for such claims are the Committee's only guide to the President's intention and are presumably binding on him in this situation.[are presumably binding on him in this situation.[23] A "protective" claim cannot endure indefinitely, stymieing this Committee's investigation still further. Mr. Quinn's and Attorney General Reno's letters acknowledge that

only the President himself can invoke the privilege. He has not done so. The Committee therefore determines that a reasonable period has elapsed for the President to make his claim and that the privilege has been waived. [[23] See. e.g., Service v. Dulles, 354 U.S. 363, 382-89 (1957); United States ex el Accardi v. Shaughnessy, 347 U.S. 260, 265-67- (1954); Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959).

3. Even If The Protective Claim Of Privilege Were Effective, It

Is Insufficient to Overcome the Committee's Lawful Demand and

Need.

In United States v. Nixon,[In United States v. Nixon,[24] the Supreme Court for the first time recognized a constitutional basis for executive privilege holding that "the protection of the confidentiality of Presidential communications has... constitutional underpinnings."[communications has... constitutional underpinnings."[25] But the Court unequivocally rejected President Nixon's claim to an absolute privilege. Blanket claims, it held, are unacceptable without further, discrete justification, and then only the need to protect military, national security, or foreign affairs secrets are to receive deferential treatment in the face of a legitimate coordinate branch demand. "However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security. secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide." "To read the Article II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of non-military and non-diplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Article III."[III."[26] [[24] 418 U.S. 683 (1973). [[25] 418 U.S. at 705-06. [[26] Id. at 706,,707.

In the matter before this Committee, the President's blanket, undifferentiated assertion of so-called "protection" privilege is unacceptable. There is not involved here any matter involving the need to protect military, diplomatic, or national security secrets. Nor is there any claim that what is involved are confidential communications between the President and his closest advisors. What is involved in this instance is the legitimate exercise of this Committee's constitutional prerogative to engage in effective oversight of the Executive Branch, which the Supreme Court has acknowledged is at its peak when the subject of investigation is alleged waste, fraud, abuse, or maladministration within a government department or even the White House. The investigative power, it has stated, "comprehends probes into departments of the federal Government to expose corruption, inefficiency, or waste."[27 "[to expose corruption, inefficiency, or waste."[27] "[T]he first

Congresses,[Congresses,[28] it continued, held "inquiries dealing with suggested corruption or mismanagement of government officials",[corruption or mismanagement of government officials",[28] and subsequently, in a series of decisions," [subsequently, in a series of decisions," [t]he Court recognized the danger to effective and honest conduct of the Government if the legislative power to curb corruption in the Executive Branch unduly were hampered."[were hampered."[29] Accordingly, the court stated, it recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[Government."[30] [[27] 354 U.S. at 187. [[28] Id. at 182. [[29] Id. at 194-95. [[30] Id at 200 n.33. See also, McGrain v. Daugherty, 272 U.S. 135, 151, 177(1927); Barenblatt v. United States, 3 60 U.S. 109,111 (1960); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n. 15 (1975).

As the Committee has gathered documents during the course of this investigation, a record has developed demonstrating that numerous previous Travel Office investigations were stymied by an unusual amount of resistance, delay, and denial in the production of necessary documents. Many congressional investigations, including this one, attempt to determine not only why certain activities occurred but why an administration has not acted or whey they have delayed certain actions. From the first days of the Travel Office debacle, the President committed to cooperate. However, as discussed supra, even Justice Department officials have indicated that they were met with any unusual lack of candor and cooperation from White House officials. The dilatory tactics engaged in by the White House in producing documents for various investigations into the Travel Office and related matters have wasted hundreds of hours in staff time of the GAO and various divisions of the Justice Department. The Committee now seeks documents to determine why the White House engaged in such conduct and why such maladministration occurred. Historically, such documents have been provided congressional committees, including such production by this Administration.[production by this Administration.[31]

The Nixon case, of course, did not involve the assertion of executive privilege in response to a congressional demand for information,[information,[32] but under the circumstances of this situation the Committee is confident that a court will reject the President's blanket claim of privilege in the face of this Committee's proper exercise of its oversight authority, its patience in pursuing the subject documents, and its palpable need for the documents it has sought. The Executive's conduct in the course of this matter can be seen as an affront to the Committee and the Congress. We reject the claim of privilege presented.

B. Claims of Attorney-Client and Work Product Privilege

1. Background

On January 3, 1996, the White House produced an undated nine-page typewritten "draft" memorandum by David Watkins in which he detailed his version of the "surrounding circumstances and the pressures" that led to the firing of the seven Travel Office"employees in May 1993. Described as a "soul cleansing," it was intended to correct "inaccuracies or erroneous conclusions" contained in the internal White House Travel Office Management Review. The memo was found in late December 1995 amongst the files of Patsy Thomasson, then the Director of the Office of Administration at the White House, and was turned over to the Committee in belated response to previous document demands. No privilege was

claimed with respect to the self-styled "soul cleansing" memo. [[31] See Footnote 11. During a document dispute with the House Commerce Committee, then chaired by Rep. John D. Dingell, President Clinton's Justice Department turned over law enforcement sensitive documents to Congress after at first arguing that they were protected deliberative documents. [[32] 418 U.S. at 712 n, 19 ("We are not here concerned with the balance between the President's generalized interest in confidentiality in and congressional demands for information.").

On January 5, 1996, the Committee issued a subpoena duces tecum to Mr. Watkins for documents and records regarding the White House Travel Office matter. On January 15, Watkins' attorney Robert Mathias provided a privilege log indicating that a November 15, 1993, memorandum from Watkins to his counsel, as well as drafts and notes regarding the White House management review of Travel Office firings, were being withheld on grounds of attorney-client and work product privilege.

On February 7, the Committee issued a subpoena duces tecum, to Matthew Moore, a former attorney in the Office of Management and Administration for any records related to the White House Travel matter, including "[matter, including "[a] 11 records relating to the 'Watkins memo' found in Patsy Thomasson's files on December 29, 1995, and produced to the Committee on January 3, 1996, and all records of any contacts, communications, or meetings related to the findings of this memo." On February 26 Mr. Moore responded that he would not turn over covered documents in his possession for which Mr. Watkins had asserted claims of privilege. The documents were identified as "undated draft memorandum from David Watkins re: response to internal travel office review."

On May 7, 1996, Mr. Watkins' attorney provided the Committee with a letter explaining the factual and legal basis for his claims of privilege. Briefly summarized, it states that in September 1993, Watkins began preparing a document responding to the various' conclusions of the internal White House Travel Office Management Review. The document went through many iterations -- at least five and perhaps as many as 10 according to Moore -- between early p

September and November 15 when it was finalized as a "Memorandum for Counsel." An unspecified number of the early drafts of the document were intended as a "potential" memo to then-White House Chief of Staff McLarty. Watkins enlisted the assistance of Matthew Moore, an attorney in the Office of Management and Administration, which he headed. Moore had graduated law school and passed the bar in 1992 and began work for Watkins in February of 1991).

Moore is claimed by Watkins said to have assisted Watkins in the preparation of the memo in two ways. First, he acted as a "scribe," typing many of the drafts, and performing an editing function. Second, he served to provide a potential privilege cloak for the documents: "Mr. Watkins discussed with Mr. Moore, a lawyer, how to prepare the Memorandum for Counsel so that it would appropriately be considered privileged and confidential." The memo, it is asserted, "was not prepared as part of the business of that office," and was written in Watkins' "good faith belief that the Memorandum for Counsel would be kept privileged and confidential and that Mr. Moore's assistance, and status as an attorney, would help preserve the privileged and confidential status of the document." Copies of the draft memorandum were sent to Watkins' private attorney, at the time Ty Cobb, for his review and advice. Watkins kept drafts of the memos in his "Ty Cobb file." The "content" of the drafts being withheld by Moore is claimed to be "the same as one of the drafts included within Mr.

Watkins' January 15, 1996, privilege log."

Mr. Moore was deposed before the Committee on March 26, 1996. He testified that "I do not personally believe I was ever in or -- ever formed a personal representation or ever served as his personal attorney." He never was paid for any personal representation. In his official capacity in the Office of Management and Administration, he would be sought out by Watkins for legal advice which Moore would secure by "confer[secure by "confer[ring]] with the White House Counsel's Office" and then conveying answers to Watkins. Moore's principal function was to respond to congressional requests, such as requests for further information from Members made at congressional hearings.

Mr. Moore further testified that Patsy Thomasson was provided a copy of the "soul cleansing" memo and that he discussed the memo with Thomasson personally and that the memo was discussed at a meeting attended by Watkins, Moore and Thomasson.[attended by Watkins, Moore and Thomasson.[33] [[33] See deposition of Matthew Moore, pages 70-72.

Question: Did you discuss either Deposition No. 4, Watkins memo, or any drafts with any other person other than David Watkins?

Answer: Yes.

Question: Can you please tell us who and approximately when you would have had those discussions?

Answer: Patsy Thomasson, and approximately between September and November; certainly in September, 1993.

Question: Would that have been during the period where it was being drafted and revised?

Answer: That's my recollection.

Question: Can you please tell us what you discussed with Patsy?

Question: Okay. First, I would ask you to discuss what you discussed with Patsy outside the presence of Mr. Watkins.

Answer: I don't recall specific discussions with her about her edits or changes to the document. However, I do recall one very brief conversation in which we very briefly discussed the advisability of the preparation of this memo, Deposition Exhibit No. 4, the Watkins memo.

Question: Can you just tell us in a little bit more detail what best you remember was said to Ms. Thomasson or by Ms. Thomasson?

Answer: Basically we communicated to each other our view that the preparation of the memo was inadvisable.

Question: How were these discussions held?

Answer: Can you --

Question: Were they in person?

Answer: Yes.

Question: Did you ever give her a copy of the Watkins memo or any of the other versions.?

Answer: Right. I don't really recall giving her a copy. I usually gave the copies straight to David.

Question: Did you have any discussions about the Watkins memo --

Answer: Can I go back just to say I may have given her a copy. I just don't recall.

Question: Did you ever have any discussions about the Watkins memo with Patsy Thomasson in the presence of David Watkins? And by "Watkins memo, I am going to be referring to meaning the memo as well as the drafts.

Answer: I believe so, yes.

Patsy Thomasson, the Director of the White House Office of Administration during the period in which the Watkins memo was evolving, was deposed by the Committee on April 22, 1996. She reported to Watkins and was not an attorney. She acknowledged that she was provided with a copy of the "soul cleansing" memo by Watkins at the time it was drafted and was asked to review it and provide edits and comments. She specifically advised Watkins that she "didn't think- it was a good idea for him to write a memorandum with regard to the Travel Office."

In testimony before the Committee on January 17, 1996, Mr. Watkins acknowledged that he initiated the preparation of the "soul cleansing" memo, that Moore acted as a "scribe", and that the memo contained truthful, accurate facts and observations. At no point in his testimony did he claim any intent to cloak that memo in privilege. The hearing record also reveals that after its discovery in Ms. Thomasson's files, the memo was distributed throughout the White House before being transmitted to the Committee, and then was released to the press by the White House.[the press by the White House.[34]

2. Assertions of Claims of Attorney-client and Work Product

Before Congressional Committees

It is well-established by congressional practice that acceptance of a claim of attorney-client or work product privilege before a committee rests in the sound discretion of that committee. Neither can be claimed as a matter of right by a witness, and a committee can deny them simply because it believes it needs the information sought to be protected to accomplish its legislative functions.[to be protected to accomplish its legislative functions.[35]

In actual practice, all committees that have denied claims of privilege have engaged in a process of weighing considerations of legislative need, public policy, and the statutory duties of congressional committees to engage in continuous oversight of the application, administration and execution of the laws that fall within its jurisdiction, against any possible injury to the witness.[its jurisdiction, against any possible injury to the witness.[36] In

the particular circumstances of any situation, a committee may consider and evaluate the strength of a claimant's assertion in light of the pertinency of the documents or information sought to the subject of the investigation, the practical unavailability of the documents or information from any other source, the possible unavailability of the privilege to the claimant if it were to be raised in a judicial forum, and a committee's assessment of the cooperation of the witnesses in the matter, among other considerations. A valid claim of privilege, free of any taint of waiver, exception or other mitigating circumstance, would merit substantial weight. But any serious doubt as to the validity of the asserted claim would diminish its compelling character. [[34] Hearing, While House Travel Office - Day Two, before the House Committee on Government Reform and Oversight, 104th Cong., 2d Sess. 13-14, 17, 25-26 (1996) (Travel Office Hearing). [[35] See Morton Rosenberg, Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry, CRS Report No. 95-464A, at 43 (April 7, 1995). [[36] See, e.g., "Refusal of William H. Kennedy, 111, To Produce Notes Subpoenaed By The Special Committee to Investigate Whitewater Development Corporation and Related Matters," Sen. Rept. No. 104-191, 104th Cong. 1st Sess. 9-19 (1995); "Proceedings Against Ralph.' Bernstein and Joseph Bernstein," H. Rept. No. 99-462, 99th Cong. 2d Sess. 13, 14 (1986); Hearings, "International Uranium Control," Before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. Vol. 1, 60, 123 (1977).

Moreover, the conclusion that recognition of non-constitutionally based privileges is a matter of congressional discretion is consistent with both traditional British parliamentary and the Congress' historical practice.[historical practice.[37]

The legal basis for Congress' prerogative in this area is premised upon its inherent constitutional prerogative to investigate which has been long recognized by the Supreme Court as extremely broad and encompassing, and which is at its peak when the subject is fraud, abuse, or maladministration within a government department.[abuse, or maladministration within a government department.[38] It is also founded on the Constitution's affirmative grant to each House of the authority to establish its own rules of procedure.[the authority to establish its own rules of procedure.[39] The attorney-client privilege is, on the other hand, a judge-made exception to the normal principle of full disclosure in the adversary process which is to be narrowly construed and has been confined to the judicial forum.[judicial forum.[40] The privilege has been deemed subject to a variety of exceptions, including communications between a client and attorney for the purpose of committing a crime or perpetrating a fraud or other obstruction of law at some future time, and to a strict standard of waiver.[standard of waiver.[41] See generally, Paul R. Rice, Attorney-Client Privilege in the United States, chaps. 8:28:15 and 9 (1993)(Rice).

Further, the work product privilege,[Further, the work product privilege,[42] another judge-made evidentiary exception has always been recognized as a qualified privilege which may be overcome by a sufficient showing of need. The Supreme Court indicated, in the very case in which it created the doctrine, that "[w e do not mean to say that all [doctrine, that "[w]e do not mean to say that all [ ] materials obtained or prepared with an eye toward litigation are necessarily free from discovery in all cases."[free from discovery in all cases."[43] Thus the courts repeatedly have held that the work product privilege is not absolute, but rather is only a qualified protection against

disclosure,[is only a qualified protection against disclosure,[44] and that the burden is on the party asserting it to establish its applicability.[applicability.[45] [[37] See Rosenberg, supra, at 44-49. [[38] McGrain v. Daugherty, 272 U.S. 135, 177 (1926); Watkins v. United States, 354 U.S. 178, 187 (1957); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n. 15 (1975). [[39] See U.S. Constit., Art. 1, sec. 5, cl. 2. [[40] Westinghouse Electric Corporation i,. Republic of the Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991). [[41] However, at least two federal circuits have held that disclosures to congressional committees do not waive claims of privilege elsewhere. See, Florida House of representatives V. U. S. Dept. of Commerce, 961 F. 2 d 941, 946 (11th Cir. 1992); Murphy v. Department of the Army,, 613 F.2d 1151, 1155 (D.C. Cir. 1979). Also see generally, Paul R. Rice, Attorney-Client Privilege in the United States, chaps. 8:2-8:15 and 9 (1993)(Rice). [[42] Some courts refuse to call the doctrine a privilege at all. In City of Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483, 485 (E.D. Pa. 1962), mandamus and prohibition denied sub nom. In General Electric Corp. v. Kirpatrick 312 F.2d 742-(3d Cir. 1962), the court stated that the work product principle "is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case."

3. The Watkins Objections to the Subpoena

Counsel for Watkins has interposed three objections to the Committee's subpoenas for the drafts of the Watkins' memo: (1) the attorney-client privilege; (2) the work product doctrine; (3) and the risk that production would be held to be a waiver of the foregoing claimed privileges. The waiver issue will be addressed first before turning the privilege claims.

a. Compliance with a Congressional Subpoena Would Not Affect a General Waiver of the Attorney-Client or Work Product Privileges.

Counsel's concern that production of the subpoenaed drafts would result in a broad waiver of his client's common law privileges is without substantial foundation. The courts have long recognized that disclosure of documents in response to a court order is compelled, not voluntary, and, therefore, such disclosure does not function as a waiver of privilege.[waiver of privilege.[46] [[43] Hickman i,. Taylor, 329 U.S. 495, 511 (1974). [[44] See, e.g., Central National Insurance Co. v. Medical Protective Co. of Forth Worth, 107 F.R.D. 393, 395 (E.D. Mo. 1985); Chepanno v. Champion International Corp., 104 F.R.D. 395, 396 (D. Ore. 1984). [[45] Barclay-American Corp. v. Kane, 746 F.2d 653, 656 (10th Cir. 1984); Nutmeg Insurance Co. v. Atwell Vogel & Sterling, 120 F.R.D. 504, 510 (W.D. La 1988). [[46] See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d- 1414, 1427 n. 14 (3d Cir. 1991) (Holding that if the party that first invoked, but then withdrew its assertion of the privilege, and instead "continued to object to the subpoena and produced the documents only after being ordered to do so, we would not consider its disclosure of those documents would be voluntary.").

Disclosure to Congress pursuant to a subpoena issued in the course of a legitimate investigation of the Executive Branch would similarly not affect a waiver. Two circuits and two district courts expressly have recognized in the context of public requests for information under the Freedom of Information Act (FOIA) that, in light of Congress' superior rights to information, disclosure to Congress of arguably privileged materials does not result in a waiver of any

privilege under FOIA'. In Florida House-of-Representatives v. U.S. Department of Commerce,[Department of Commerce,[47] the appeals court held that because the FOIA exemption for "deliberative process" material may not be exercised against Congress, efforts to resist such a subpoena on grounds of privilege would be fruitless. Because the subpoena could not be resisted successfully, the court reasoned, providing the material to the Congress would not trigger a waiver of the privilege.

The claim of waiver previously was considered and rejected by the D.C. Circuit Court of Appeals in Murphy v. Department of the Army.[D.C. Circuit Court of Appeals in Murphy v. Department of the Army.[48] Murphy involved a request for a document under the Freedom of Information Act (FOIA)[Information Act (FOIA)[49] from the Department of the Army which had been disclosed to a congressman. The requester argued that even if the document fell within the deliberative process exemption of FOIA,[FOIA,[50] the disclosure constituted a waiver of the FOIA privilege. The appeals court rejected the argument, holding that with respect to the "doctrine of waiver," that "it is evident that the disclosure to the Congress could not have had that consequence." Congress, it stated, long has "carve[stated, long has "carve[d] out for itself a special right of access to privileged information not shared by others."[privileged information not shared by others."[51] If "every disclosure to Congress would be tantamount to a waiver of all privileges and exemptions, executive agencies inevitably would become more cautions in furnishing sensitive information to the legislative branch -- a development at odds with public policy which encourages broad congressional access to governmental information."[broad congressional access to governmental information."[52] The court concluded: "For these reasons, we conclude that, to the extent that Congress has reserved to itself in Section 552(c)[has reserved to itself in Section 552(c)[now, 552(d)] the right to receive information not available to the general public, and actually does receive such information pursuant to that section (whether in the form of documents or otherwise), no waiver occurs of the privileges and exemptions which are available to the executive branch under the FOIA with respect to the public at large.[FOIA with respect to the public at large.[53]

The concern raised by counsel for Watkins that disclosure would result in a waiver of privilege in future litigation is, therefore, wholly unwarranted in light of the compulsory and irresistible nature of the Committee's demands.[of the Committee's demands.[54] We turn now to consideration of the privilege objections to the Committee's subpoenas. [[47] 961 F. 2d 941, 946 (11th Cir.). cert. dismissed. 1135 Ct. 446 (1992). [[48] 613 F.2d 1151, 1155 (D.C. Cir. 1979). [[49] 5 U.S.C. 552 (1994). [[50] 5 U.S.C. 552 (b)(5). [[51] 617 F.2d at 1 155-56. [[52] Id., at II 56. [[53] Id. See also, In re Sunrise Securities Litigation, 109 Bankr. 658, 1990 U.S. Dist. Lexis 168, U.S.D.C. E.D.Pa., Jan. 9, 1990 (same); In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel, 9 E.B.C. 1929, 1987 U.S. Dist. Lexis 10912, U.S.D.C. N.D. Ill. (same). Compare FTC v. Owings- Corning Fiberglass Corp., 626 F.2d 966, 970 (D.C. Cir. 1980) (release to a congressional requester is not deemed disclosure to public generally); Exxon Corp. v. FTC, 589 F.2d 582, 589 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979) (same); Ashland Oil Co., Inc. v. FTC, 548 F.2d 977. 979 (D.C. Cir. 1979) (same).

b. The attorney-client privilege does not shield the various

versions of the Watkins memo from disclosure to this Committee.

As has been indicated above, it is within the sound discretion of Congress to decide whether to accept a claim of common law testimonial privilege. Unlike some other testimonial, privileges such as the privilege against compulsory self-incrimination, neither the attorney- client privilege nor the work product doctrine is rooted in the Constitution.[Constitution.[55] Moreover, congressional committees need not recognize claims of privilege in the same manner as would a court of law. A congressional committee must make its own determination regarding the propriety of recognizing the privilege in the course of an investigation taking into account the House's constitutionally- based responsibility to oversee the activities of the Executive Branch. In the circumstances of the situation before us, it is the Committee's considered judgment that Mr. Watkins' claims of privilege are not well-founded. [[54] It is to be noted that the American Bar Association Model Code of Professional Responsibility provides that "A lawyer may reveal: ... [reveal: ... [c]onfidences or secrets when... required by law or court order." DR 4-101 (c)(2). See also, Meyerhoff v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1195 (2d Cir. 1974), Application of Solomon Friend, 411 F. Supp. 776, 777 note (SDNY 1985), cases holding that an attorney's obligation of confidentiality is waived if it is necessary to defend against accusations of wrongful conduct. [[55] See Mannes v. Meyers, 419 U.S. 449, 466 n. 15 (1975).

b.1 Watkins has not established that he entered into an

attorney-client relationship with Moore:

The burden of establishing the existence of the attorney-client privilege rests with the party asserting the privilege. In re Grand Jury Investigation No. 83-2-35.[Jury Investigation No. 83-2-35.[56] Blanket assertions of the privilege have been deemed "unacceptable," SEC v. Gulf & Western Industries, Inc.,[57 and are disfavored strongly.[Industries, Inc.,[57] and are disfavored strongly.[58] The proponent conclusively must prove each element of the privilege, to wit: (1) a communication, (2) made in confidence and preserved, (3) to an attorney acting in his professional capacity, (4) by a client, (5) for the purpose of seeking or obtaining legal advice.[the purpose of seeking or obtaining legal advice.[59] But the mere fact that an individual communicates with an attorney does not make his communication privileged.[his communication privileged.[60] [[56] 737 F.2d 447, 450-51 (6th Cir. 1983). [[57] 518 F. Supp. 675, 682 (D.D.C. 1981). [[58] In re Grand Jury Investigation No. 83-2-35, supra, 737 F.2d at 454. [[59] See, e.g., 8 Wigmore, Evidence, Sec. 2292, at 554 (McNaughton rev. ed. 1964); United Slates i,. United Hoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). [[60] See. e.g., United States v. Costanzo, 625 F.2d 465, 468 (3d Cir. 1980) ("[I t is true that [Cir. 1980) ("[I]t is true that [a] communication is not privileged simply because it is made by or to a person who happens to be a lawyer."), cert. denied 472 U.S. 1017 (1985); Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977) ("A communication is not privileged simply because it is made by or to a person who happens to be a lawyer"); United States v. Tedder, 801 F.2d 1437, 14.42-43 (4th Cir. 1986) (Friend's communications with attorney held not privileged despite fact that friend was both a lawyer and colleague in same firm when he spoke to her not as a professional legal advisor, did not seek legal advice from her, and did not expect the communications to remain confidential).

The case law consistently has emphasized that one of the essential elements of the attorney-client privilege is that the attorney be acting as an attorney and that the communication be made for the purpose of securing legal services.

The privilege therefore does not attach to incidental legal advice given by an attorney acting outside the scope of his role as attorney. "Acting as a lawyer encompasses the whole orbit of legal functions. When he acts as an advisor, the attorney must give predominantly legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice."[business advice."[61]

In order to ascertain whether an attorney is acting in a legal or business advisory capacity, the courts have held it proper to question either the client or the attorney regarding the general nature of the attorney's services to his client, the scope of his authority as agent and the substance of matters which the attorney, as agent, is authorized to pass along to third parties.[authorized to pass along to third parties.[62] Indeed, invocation of the privilege may be predicated on revealing facts tending to establish the existence of an attorney-client relation.

Finally, the client must intend that his communications with his lawyer are confidential and the confidentiality must be maintained subsequently.[subsequently.[63]

Because of the privilege's inhibitory effect on the truth-finding process and its impairment of the public's "right to every man's evidence,"[evidence,"[64] modern liberal discovery rules have taken a narrow view of the privilege.[of the privilege.[65] This tendency toward limiting the privilege is manifested most clearly in the strict standard of waiver.[manifested most clearly in the strict standard of waiver.[66] Thus the voluntary disclosure of privileged information, whether by the client or the attorney with the client's consent, waives the privilege [[67] because it destroys the confidentiality of a communication and thereby undermines the justification for preventing compelled disclosures.[68 Waiver need not be express,[disclosures.[68] Waiver need not be express,[69] nor is it necessary that the client waive the privilege knowingly.[that the client waive the privilege knowingly.[70] Waiver may be evidenced by word or act,[evidenced by word or act,[71] but may be inferred from a failure to speak or act when words or action would be necessary to preserve confidentiality.[confidentiality.[72] Courts regularly hold that the privilege is waived as to the material disclosed when the client or his attorney deliberately discloses the contents of a privileged communication, such as when answering interrogatories, testifying in court or at examination before trial, submitting affidavits or pleadings to the Court, or in transacting business with a third party.[Court, or in transacting business with a third party.[73]

Furthermore, the courts have held that less than full disclosure often will cause a waiver, not only as to disclosed communications, but also as to communications relating to the same subject matter that were not disclosed themselves.[were not disclosed themselves.[74] By partial disclosure, the client may be waiving voluntarily the privilege as to that which he considers favorable to his position, but attempting to invoke the privilege as to the remaining material, which he considers unfavorable.[to the remaining material, which he considers unfavorable.[75] Selective assertion or disclosure usually involves a material issue in the proceeding, and there is a great likelihood that the information disclosed is false or intended to mislead the other party.[disclosed is false or intended to mislead the other party.[76] [[61] Zenith Radio Corp. v. Radio Corp. of America, 121 F.Supp. 792, 794 (D. Del. 1954) (emphasis supplied). [[62] Colton v. US., 306 F.2d 633, 636, 638 (2d Cir. 1962); US. v. Tellier, 255 F.2d 441 (2d Cir. 1958); JP. Foley & Co., Inc. i,. Vanderbilt, 65 FRD 523,

526-27 (S.D.N.Y. 1974). [[63] Rice, supra, at 6:1, 6:2, 6:30, 9: 1. [[64] 8 J. Wigmore 2192, at 70. [[65] Magida ex rel. Vilcon Detinning Co. i,. Continental Can Co., 12 F.R.D. 74, 77 (S.D.N.Y. 1951). [[66] See, e.g., Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981); United States v. AT&T Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980). [[67] 8 J. Wigmore, 2327, at 632-39. [[68] United States v. AT&T Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) "[1980) "[t]he mere showing of voluntary disclosure will generally suffice to show waiver of the attorney-client privilege."); In re Horowitz, 482 F.2d 72, 82 (2d Cir.) cert. denied, 414 U.S. 867 (1973). [[69] Blackburn v. Crawford, 70 U.S. (3 Wall.) 175, 194 (1965). [[70] In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979). [[71] Magida ex rel. Vulcan Determining Co. v. Continental Can Co., 12 F.R.D. 74, 77 (S.D.N.Y. 1951). [[72] Id. [[73] 8 J. Wigmore, 2327. [[74] Teachers Ins. & Annuity Assn. of America i,. Shamrock Broadcasting Co., 521 F.Supp. 638, 641 (S.D.N.Y. 1981); R.J Hereley & Sons Co. v. Stotler & Co., 87 F.R.D. 358, 359 (N.D. Ill. 1980); Hercules, Inc. v. Exxon Corp., 434 F.Supp. 136, 156 (D. Del. 1977); Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp, II 46, 1161-62 (D.S.C. 1974). [[75] Perrigrion v. Bergen Brunswig Corp., 77 F.R.D. 455, 461 (N.D. Calif 1978); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Eel. 1977); Duplan v. Deering Milliken, 397 F.Supp. 11 46, 1161-62 (D.S.C. 1974); AT&T v. United Tel. Co., 60 F.R.D. 177, 188-86 (M.D..Gla. 1973). [[76] United States v. Aronoff, 46,6 F.Supp, 855, 862 (S.D.N.Y. 1979.).

Thus, pleading an "advice of counsel" defense, which puts the attorney's advice in issue,[attorney's advice in issue,[77] has been held to waive the privilege as to all communications relating to that advice. The rationale for the subject matter waiver rule is one of fairness. Professor Wigmore has stated the principle as follows: "[W hen [has stated the principle as follows: "[W]hen [the client's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. It therefore is designed to prevent the client from using the attorney-client privilege offensively, as an additional weapon."

The courts also have limited severely the attorney-client privilege through the development of an implied waiver doctrine. Thus, where a client shares his attorney-client communications with a third party, the communications between attorney and client are no longer strictly "confidential," and the client has waived his privilege over them.[privilege over them.[78] Even if the client attempts to keep communications confidential by having the third party agree not to disclose the communications to anyone else, the courts will still consider "confidentiality" between attorney and client breached and the communication no longer privileged.[the communication no longer privileged.[79] Courts have applied this concept of confidentiality narrowly to prevent corporations from sharing an attorney-client communication with an ally and then shielding the communication from a grand jury or adversary.[shielding the communication from a grand jury or adversary.[80] As a general rule, courts also apply the waiver rule to disclosures made to government agencies.[government agencies.[81] Thus a person or corporation who voluntarily discloses confidential attorney-client communications to a government agency loses the right to later assert privilege for those communications. [[77] Eg., United States v. Woodall, 438 F.2d 1317, 1323-24 (5th Cir. 1970), cert. denied, 403 U.S. 933 (1971); Transworld Airlines v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964), cert. dismissed, 380 U.S. 248 (1965); Barr Marine Prods. v. Borg-Warner Corp., 84 F.R.D. 631, 635 (E.D. Pa. 1979); Hangards, Inc. v. Johnson & Johnson, 41 F.Supp. 926, 929 (N.D. Calif

1976). [[78] See, e.g., United States v. El Paso Co., 682 F.2d 530, 539, 540 (5th Cir. 1982) (Creating documents with knowledge that independent accountants may need access to them to complete an audit waives privilege.); Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (Disclosure of documents to SEC waives privilege); United States v. Miller, 660 F.2d 563, 567-68 (5th Cir. 198 1) (Previous delivery of accounting books to IRS vitiates privilege.); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464 (E.D. Mich. 1954) (Privilege waived on disclosure to Justice Department). [[79] 8 J. Wigmore, Evidence, 2367 at 636 (McNaughton rev. ed. 1961). [[80] Permian Corp. v. U.S., 665 F.2d 1214, 1221-22 (D.C. Cir. 1981). [[81] See, e.g., United States v. Miller, 660 F.2d 563, 567-68 (5th Cir. 1981) (disclosure to IRS); In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672 (D.C. Cir. 1979), cert. denied, 444 U.S. 915 (1979) (to Antitrust Div. of Dept. of Justice); Donovan v. Fitzsimmons, 90 F.R.D. 583. 585 (N.D. Ill. 1981)(to Dept. of Labor); Litton Systems, Inc. v. American Tel. & Tel. Co., 27 Fed. R. Serv. 2d (Callaghan) 819 (S.D.N.Y. 1979) (to district attorney); In re Penn. Cent. Commercial Paper Litig., 61 F.R.D. 453, 462-64 (S.D.N.Y. 1973) (to SEC); D'Ippolito v. Cities Sen,. Co., 39 F.R.D. 610 (S.D.N.Y. 1965) (to Antitrust Div. of Dept. of Justice).

While some lower courts have adopted a "limited waiver" rule, which allows corporations to share their confidential attorney-client communications with agencies such as the SEC without having to waive the privileged status of these documents against other parties,[the privileged status of these documents against other parties,[82] it is a distinctly: minority view. The prevailing view, enunciated in the most recent decisions of the Second,[83 Fourth,[the most recent decisions of the Second,[83] Fourth,[84] and District of Columbia Circuits,[of Columbia Circuits,[85] holds that "if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information, as well as 'the details underlying the data which was to be published,' will not enjoy the privilege."[enjoy the privilege."[86]

The appeals court in re Sealed Case explained the rationale and scope of the implied waiver rule as follows: "The implied waiver doctrine has been more fully developed, however, in the context of the attorney-client privilege. Any disclosure inconsistent with maintaining the confidential nature of the attorney client relationship waives the privileges when a party reveals a part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter because "the privilege of secret consultation is intended only an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." "A simple principle unites the various applications of the implied waiver doctrine. Courts need not allow a claim of privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege. Thus, since the purpose of the attorney-client privilege is to protect the confidentiality of attorney-client communications in order to foster candor within the attorney-client relationship, voluntary breach of confidence for tactical purposes waives the privilege. Disclosure is inconsistent with confidentiality, and courts need not permit hide- and-seek manipulation of confidence in order to foster candor."[and-seek manipulation of confidence in order to foster candor."[87] [[82] See, e.g., Diversified Industries v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977); Byrnes v. IDS Realty Trust Co., 85 F.R.D. 679. 687-89 (S.D.N.Y. 1980); In re Grand Jury Subpoena, 478 F.Supp. 368, 372-73 (E.D.

Wisc. 1979). [[83] In re John Doe Corporation, 675 F.2d 482 (2d Cir. 1982). [[84] In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988); United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984); In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984). [[85] In re Subpoena Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984); In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). [[86] In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988).

The testimony before this Committee of Mr. Watkins, Mr. Moore and Ms. Thomasson, their conduct during the evolution of the memo, as well as the conduct of the White House in handling the disputed documents, belie the existence of a valid claim of attorney-client privilege. There is substantial doubt whether there was in fact an attorney- client relation between Moore and Watkins and whether Moore was actually performing legal services for Watkins. There is no doubt that even if such a relation arose at some early time, the necessary maintenance of confidentiality was not maintained and the privilege, if it existed at all, was waived.

Mr. Watkins' testimony before this Committee on January 16, 1996, prior to the revelation that numerous drafts pre-and post-dating the soul cleansing memo were discovered in Thomasson's files, described Moore's role in the creation of that document as solely that of a scribe:" "I dictated this memorandum ... I had a scribe to actually write it."[write it."[88] It is only when the existence of the numerous drafts of the document became known that a legal relationship was concocted. Watkins' legal memo concedes Moore was a scribe, but also claims he was advising Watkins "how to prepare the Memorandum to Counsel so that it would be considered privileged and confidential." More to the point, Mr. Watkins is said to have believed that "Moore's assistance, and status as an attorney. would help preserve the privileged and confidential status of the document." To prove Mr. Moore's value, Watkins' counsels' memo points to the fact that each and every version was stamped "PRIVILEGED AND CONFIDENTIAL." But it is hardly necessary to have an attorney to wield such a stamp. What is necessary is that one's attorney perform legal services. [[87] 676 F.2d 793, 818 (D.C. Cir. 1982). [[88] Travel Office Hearing, supro, at 14.

Mr. Moore testified that he certainly did not believe he was acting as Watkins' private attorney in this matter.[acting as Watkins' private attorney in this matter.[89] Rather, only allows that Watkins could have "a colorable claim [allows that Watkins could have "a colorable claim [of privilege] to assert."[assert."[90] Nor does Moore directly claim he was Watkins' attorney in this matter in his official capacity as "special counsel" to that Office. In describing how he "gave" legal advice, he stated that Watkins would come to him about a legal issue and he would go to the White House Counsel's Office for the answer and then convey it to Watkins.[Watkins.[91]

In fact, Moore was fresh out of law school and a legal tyro, while Watkins throughout this entire period had a major Washington law firm, Hogan & Hartson, on retainer. Indeed, Watkins' present counsel asserts that many, if not all, of the drafts in question were sent to Mr. Cobb of that firm "for his review and advice." Yet the privileged relationship that is asserted is between Moore and Watkins and not Cobb and Watkins.

Close scrutiny of the "soul cleansing" memo, which is asserted to contain the same content as some of the drafts now in contest, does not indicate that it is a legal document or one that required the application of legal skills. It is

essentially a factual recitation, from Watkins' point of reference, of what happened during the period that led to the May 1993 firings of the Travel Office staff, why it happened, and why the internal review was inaccurate. The Travel Office was squarely within Mr. Watkins' official jurisdiction. This document, then, readily can be seen as predominantly relating to the business of the Office of Management and Administration rather than as a document that dealt with legal issues or even needed more than minimal legal expertise.

In sum, this aspect of the claim of attorney-client privilege appears to be nothing more than a transparent afterthought. There was no intent to create the requisite relation; and the documents created related to the business of the Office of Management and Administration. [[89] Dep. Tr. at 64-65. [[90] Id. at 65. [[91] Id. at 66,

Finally, even if an attorney-client relationship could be established, it certainly was waived by the early sharing of the ultimately revealed draft with Patsy Thomasson, by the discussions of that draft by Watkins and Moore with Thomasson, and by its wide distribution after its discovery by the White House to other White House personnel and the media. It would be specious to contend that the waiver is limited only to Thomasson's draft. Watkins' counsel has asserted that the content of the withheld drafts is similar. That alone suffices to vitiate the privilege for all other extant drafts. Selective assertion and disclosure is not tolerated by the courts. It is equally unacceptable to this Committee.

b.2 The Claim of Protection under the Work Product Doctrine is

Not Sustainable.

Watkins claims that the work product doctrine protects the withheld documents because they were the "work of an attorney is preparation for litigation" and contain "subjective beliefs, impressions, and strategies" which are protected as "opinion" work product. In fact, the work product doctrine is not applicable in the congressional forum; but even if applicable, it cannot be sustained under the circumstances of this situation. It is problematic that the documents in question actually were prepared for litigation. In any event, the Committee's need for the documents would demonstrate the heightened need necessary when opinion work product is involved if this matter were before a court. It is plain that the qualified privilege afforded has been waived by Watkins' conduct.

The qualified immunity from discovery of an attorney's work product is recognized by the Supreme Court[product is recognized by the Supreme Court[92] and codified in Rule 23(b)(3) of the Federal Rules of Civil Procedure.[23(b)(3) of the Federal Rules of Civil Procedure.[93] The Rule provides that in a civil action there is qualified immunity from discovery when materials are:

1. "documents and tangible things["

2. "prepared in anticipation of litigation or for trial;" and

3. "by or for another party or for that other party's representative." [[92] Hickman v. Taylor, 329 U.S. 495 (1947). [[93] Rule 26(b)(3) provides in pertinent part: "Trial Preparation: Materials ...[Preparation: Materials ...[A] party may obtain discovery of documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for

that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent Of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

To overcome the qualified immunity, the party seeking discovery must make a showing of. (1) substantial need for the materials; and (2) inability to obtain the substantial equivalent of the information without undue hardship. Upon such a showing, the qualified immunity from discovery is overcome and the court will order the materials produced.[produced.[94]

The federal rules do not define what is meant by the term"'litigation" or "in anticipation of." However, the Special Masters' Guidelines for the Resolution Privilege Claims, approved and adopted by the court in United States v. American Telephone & Telegraph Co.,[Telegraph Co.,[95] contain a detailed discussion of both phrases that reflects precedent to that time and has been influential since then. The Special Masters defined "litigation" as including "a proceeding in a court or administrative tribunal in which the parties have the right to cross-examine witnesses or to subject an opposing party's presentation of proof to equivalent disputation." 86 F.R.D. at 627. On its face, the definition would

~not apply to Congress, which of course is not a court or administrative tribunal, or to a congressional investigative hearing which, while often confrontational, does not afford an opportunity for witnesses to cross-examine other witness' or present rebuttal testimony as would be the case in the adversarial adjudicative forum. We are aware of no court that has held the work product doctrine applicable to a legislative proceeding. The definition is also consonant with the language of Rule 26(b)(3) which exclusively uses terms such as "party", "litigation", "trial" and "discovery" which are alien to the legislative hearing process.[legislative hearing process.[96]

The "in anticipation" element was defined by the Special Masters to mean: "any time after initiation of the proceeding or such earlier time as the party who normally would initiate the proceeding had tentatively formulated a claim, demand, or charge. When the material was prepared by a party who normally would initiate such a proceeding, that person must establish the date when the claim, demand, or charge was tentatively formulated. When the material was prepared by a potential defendant or respondent, that person must establish the date when he received a demand or warning of charges or information from an outside source that a claim, demand, or charge was in prospect."[outside source that a claim, demand, or charge was in prospect."[97] [[94] See, generally 8 Wright, Miller and Marcus, Federal Practice and Procedure, Sections 2021-2028 (1994). [[95] 86 F.R.D. 603 (D.D.C. 1980). [[96] Wright, Miller and Marcus, supra, Section 2024 at 338-357; 86 F.R.D. at 627-30.

The courts have made it clear that while there is no requirement that litigation have already commenced in order for the work product doctrine to be operative, there must be "a more immediate showing than the remote possibility of litigation."[98 "[the remote possibility of litigation."[98] "[F]or documents to qualify as attorney work product, there must be an identifiable prospect of litigation (ie., specific claims that already have arisen) it the time the

documents were prepared."[the documents were prepared."[99] One appellate court recently recognized that "because litigation is an ever-present possibility in American life, it is more often the case than not that new events are documented with the general possibility of litigation in mind. Yet '['[t]he mere fact that litigation does ensue does not, by itself, cloak materials' with work product immunity. The document must be prepared because of the prospect of litigation when the preparer faces an actual claim or potential claim following an actual event or series of events that reasonably could result in litigation."[events that reasonably could result in litigation."[100] Materials prepared in the ordinary course of business will not be protected from production, even if the party is aware that the document may also be useful in the event of litigation."[101 Similarly, "[useful in the event of litigation."[101] Similarly, "[t]he acts performed by a public employee in the performance of his official duties are not prepared in-anticipation of litigation or for trial' merely by virtue of the fact that they are likely to be the subject of later litigation."[later litigation."[112] [[97] 86 F.R.D. at 627. [[98] Garfinkle i,. Arcada National Corp., 64 F.R.D. 688, 690 (SDNY 1974). [[99] Fox ii. California Sierra Financial Services, 120 F.R.D. 520, 525 (N.D. Calif 1988). [[100] National Union Fire Ins. Co. i. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992). [[101] Smith v. Conway Organization, 154 F.R.D. 73, 78 (SDNY 1994). See also Litto'n Industries i,. Lehman Bros. Kuhn Loeb, Inc., 125 F.R.D. 51, 54-55 (SDNY 1989). 112 Grossman v. Schwartz, 125 F.R.D. 376, 388 (SDNY 1989); Department of economic Development v. Arthur Anderson Co., 139 F.R.D. 295, 700 (SDNY 1991).

Rule 26(b)(3) provides heightened protection for "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." This protection against disclosure, however, is not absolute and has been held to yield inappropriate circumstances.[held to yield inappropriate circumstances.[103] Thus, when mental impressions are at issue in the case and the need for the material is compelling, they have been held discoverable." Courts consistently have denied the protection in such "at issue" cases where complete or partial lack of recollection of critical meetings or events has been claimed."[claimed."[106] The protection has been denied where what was at issue was the reason a government prosecutor instituted an action.

Assuming the subject documents are not covered by attorney-client privilege, it would appear that a court would have difficulty in finding that the documents were prepared "in anticipation of litigation." We are not aware of case precedent holding that a congressional investigative hearing is a proceeding meant to covered by Rule 26(b)(3). The qualified privilege recognized by the rule was designed for the adversary process and, like the attorney-client privilege, is likely to be held limited to the needs of that forum. It is also problematic whether a successful argument could be made that any of the documents were produced in the reasonably foreseeable likelihood that Watkins would be a party in any civil or criminal action.

Further, even if the documents fall within the scope of the rule, the Committee would likely be able to demonstrate the heightened level of need required when opinion work product is involved. The Committee's inquiry has been concerned in large part with the motivations of the participants in the Travel Office matter. Indeed, claims of lack of complete or only partial recollections of meetings or events have consistently impeded the progress of the Committee's investigation. The case law alluded to above indicates that

in such circumstances the courts would deny work product protection.

Additionally, the actions of Watkins and the White House in dealing with the soul cleansing memo, recounted above in the discussion of the issue of waiver of the attorney-client privilege, are equally applicable and compelling here.

Finally, it is to be recalled that the burden is on the claimant to demonstrate the applicability of the privilege claimed, and in the end the determination' whether to accept it rests in the sound discretion of the Chairman and the Committee. [[103] In re John Doe Corporation. 675 F.2d 482, 492 (2d Cir. 1982). [[104] Holmgren v. State Farm Mutual Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992) (claim of bad faith in the settlement process); Handguards Inc. v. Johnson & Johnson, 413 F.Supp 926, 931-31 (N.D. Calif. 1976) (bad faith in instituting litigation). [[105] Erlich v. Howe, 848 F.Supp 842, 492-93 (SDNY 1994); Redvanly v. NYNEX Corp., 152 F.R.D. 460,468-69 (SDNY 1993); Doubleday, v. Ruh, 149 F.R.D. 601, 608 (E.D. Cal. 1993); In re Worlds of Bonder Securities Litigation. 147 F.R.D. 208, 212 (N.D. Cal. 1992). [[106] Doubleday v. Ruh, supra, 149 F.R.D. at 608 ("Here, plaintiff asserts that the main issue of her case is the affect [plaintiff asserts that the main issue of her case is the affect [sic] defendants had on the district attorney's decision to prosecute".); EEOC v. Anchor Continental, Inc., 74 F.R.D. 523, 526-28 (D.S.C. 1977) ("However, there must be an exception to this [("However, there must be an exception to this [work product] rule when the Court's in camera inspection reveals that the plaintiff, a branch of the United States government, has little faith in its case, has little evidence to go on and hopes to be able to prove the case through discovery or force a settlement upon a defendant who might not be able to stand the financial burden of defending itself).

AUTHORITY

The Committee on Government Reform and Oversight is a duly established Committee of the House of Representatives, pursuant to the Rules of the House of Representatives, 104th Congress, Second Session.

Rule 10 grants the Committee on Government Reform and Oversight jurisdiction over, inter alia, "The overall economy, efficiency and management of government operations and activities..." Rule 10 further states that the Committee "may at any time conduct investigations of any matter..."

The Rules of the Committee on Government Reform and Oversight, approved on January 10, 1995, provide that the Chairman "shall: (d) Authorize and issue subpoenas as provided in House Rule XI, clause 2(m), in the conduct of any investigation or activity or series of investigations or activities within the jurisdiction of the committee."

Pursuant, therefore, to its responsibilities and authority as mandated by the House of Representatives, the Committee has issued subpoenas for documents and information which, as prescribed by Committee rules, were deemed essential to its inquiry. The subpoenas which form the basis of the recommended resolution were issued in full conformance with this authority.

As indicated above, White House Counsel John M. Quinn, David Watkins, and Matthew Moore were summoned to furnish materials in their custody and control pursuant to valid, duly executed subpoenas of the Committee, but they deliberately failed to comply with the terms of said subpoena.

CHRONOLOGY OF CORRESPONDENCE 107

DATE	TO	FROM
June 1, 1993	Hon. John Conyers, Jr.	Hon. William F. Clinger
	SUBJECT:	Request Investigation
June 16, 1993	Thomas F. McLarty	Hon. William F. Clinger
	SUBJECT:	Ask Questions
	Hon. Robert Michel 111	
	Hon. Newt Gingrich 112	
	Hon. Richard Armey 113	
	Hon. Henry Hyde 114	
June 18, 1993	William F. Clinger, Jr.	Thomas F. McLarty
	SUBJECT:	Announce Mgmt. Review
July 2, 1993	Robert Michel Thomas F. McLarty	
	SUBJECT:	Release Mgmt Review
July 13, 1993	Hon. Jack Brooks"'	President Bill Clinton
	SUBJECT:	Promise Cooperation
July 15, 1993	William F. Clinger, Jr.	John Conyers, Jr.
	SUBJECT:	Refer to GAO
August 6, 1993	President Bill Clinton	Robert Michel
	SUBJECT:	Asks Questions
	Dick Armey	
	Newt Gingrich	
	Henry Hyde	
	William F. Clinger, Jr.	
Aug. 24, 1993	William F. Clinger, Jr.	Thomas F. McLarty

107 This correspondence has been made public in Correspondence between the While House and Congress in the Proceedings Against John M. Quinn, David Waiktns, and Matthew Moore, Committee Investigation on the White House Travel Office Matter, House Committee on Government Reform and Oversight, 104th Congress, 2d Session. May 1996.

108 John Convers. at the time of this letter was the Chairman of the House Committee on Government Operations. He is currently the Ranking Minority Member of the House Committee on the Judiciary

109 William F Clinger. at the time of this letter, was the Ranking Minority Member of the House Committee on Government Operations. He is currently Chairman of the House Committee on Government Reform and Oversight

110 Thomas F McLarty at the time of this letter. was the White House Chief of Staff.

111 Robert Michel. at this of this letter, was the Minority, Leader in the U.S House of Representatives. He currently is retired

from the U.S. House

112 Newt Gingrich. at the time of this letter, was the Minority Whip in the U.S House of Representatives. He currently is the Speaker of the U.S. House

113 Richard Armey, at the time of this letter, was the Chairman ot'the Republican Conference in the U.S. House of Representatives. He currently is the Majority Leader of the U.S. House.

114 Henry Hyde, at the time of this letter, was a member of the House Committee on the Judiciary. He currently is the Chairman of that Committee.

115 Jack Brooks, at the time of this letter, was Chairman of the House Committee on the Judiciary. He currently is retired from the U.S. House.

DATE	TO	FROM
October 11, 1993	William F. Clinger, Jr.	Bernard W. Nussbaum 116
	SUBJECT:	Refer to Justice Dept.
October 15, 1993	Bernard W. Nussbaum	William F. Clinger
	SUBJECT:	Asks Questions
October 26, 1993	William F. Clinger, Jr.	Bernard W. Nussbaum
	SUBJECT:	Refer to Justice Dept.
February 24, 1994	President Bill Clinton	William F. Clinger, Jr.
	SUBJECT:	Asks Questions
February 24, 1994	Janet Reno 118	William F. Clinger
	SUBJECT:	Asks Questions
September 13, 1994	Joel 1. Klein 119	Kevin Sabo 120
	SUBJECT:	Request for Documents
September 20, 1994	Philip Lader 121	William F. Clinger, Jr.
	SUBJECT:	Request for Documents
April 24, 1995	Steven Riewerts 122	Tiechenor & Associates
	SUBJECT:	Accounting Recommendation
May 4, 1995	William F. Clinger, Jr.	Abner J. Mikva 124
	SUBJECT:	Limited Document Access
May 11, 1995	Phil Larsen 125	Jonathan R. Yarowsky
	SUBJECT:	Document Review Procedure
May 31, 1995	Abner Mikva	William F. Clinger, Jr.
	SUBJECT:	Request for Documents
June 1, 1995	William F. Clinger, Jr.	Abner J. Mikva
	SUBJECT:	Requests a Meeting

June 14, 1995	Abner Mikva		William F. Clinger, Jr.
		SUBJECT:	Requests for Interviews

116 Bernard W. Nussbaum, at the time of this letter, was the White House Counsel.

117 Frank Wolf, at the time ofthis letter, was the Ranking Minority Member ofthe House Appropriation's Subcommittee on Treasury, Postal Service. and General Government.

118 Janet Reno is the Attorney General of the United States

119 Joel Kline is the Deputy Counsel to the President

120 Kevin Sabo is the General Counsel ofthe House Committee on Government Reform and Oversight.

121 Philip Ladcr, at the time of this letter, was the White House Deputy Chief o fStaff

122 Steven Riewerts was the interim director of the White House Travel Office after the May 1993 firings.

123 Tichenor and Associates is a management accounting firm which was hired to audit the White House Travel office for calendar year 1994.

124 Abner J. Mikva, at the time of the letter, was the White House Counsel. He currently is retired from the U.S. GovernmenL

125 Phi I Larsen, at the time of the letter, was the Chief I nvcstigator of the House Committee on Government Reform and Oversight. He currently is retired from the U.S. Government.

126 Jonathan R. Yarowslcy is an Associate Counsel at the White House.

DATE	TO		FROM
June 16, 1995	Barbara Comstock 127		Jonathan R. Yarowsky
		SUBJECT:	Promise of Documents
June 26, 1995	Abner Mikva		Kevin Sabo
		SUBJECT:	Procedures for Documents
June 29, 1995	William F. Clinger, Jr.		Abner J. Mikva
		SUBJECT:	Promise of Documents
July 7, 1995	Kevin Sabo		Jonathan R. Yarowsky
		SUBJECT:	Limited access to documents

July 13, 1995	Abner Mikva		William F. Clinger, Jr.
		SUBJECT:	Requests for Documents
July 15, 1995	William F. Clinger, Jr.		Abner J. Mikva
		SUBJECT:	Procedures for Documents
July 17, 1995	Abner Mikva		William F. Clinger, Jr.
		SUBJECT:	Requests for Documents
July 19, 1995	Phil Larsen		Natalie R. Williams 128
		SUBJECT:	Limited access to documents
July 20, 1995	Abner Mikva		William F. Clinger, Jr.
		SUBJECT:	Requests for Information
July 25, 1995	William F. Clinger, Jr.		Abner J. Mikva
		SUBJECT:	Provides Limited Info.
July 26, 1995	Abner Mikva		William F. Clinger, Jr.
		SUBJECT:	Requests for Information
August 1, 1995	Natalie Williams		Phil Larsen
		SUBJECT:	Procedures for Documents
August 2, 1995	Phil Larsen		Natalie Williams
		SUBJECT:	Limited access to documents
August 9, 1995	Phil Larsen		Natalie Williams
		SUBJECT:	Limited access to documents
August 17, 1995	Abner Mikva		Kevin Sabo
		SUBJECT:	Procedures for Documents
August 23, 1995	Kevin Sabo		Jane C. Sherburne 129
		SUBJECT:	Procedures for Documents
August 24, 1995	Abner Mikva		Kevin Sabo
		SUBJECT:	Procedures for Documents
August 25, 1995	Phil Larsen		Natalie Williams
		SUBJECT:	Promise of Documents
August 25, 1995	Barbara Comstock		Natalie Williams
		SUBJECT:	Limited access to documents
August 25, 1995	Natalie Williams		Phil Larsen
		SUBJECT:	Requests for Documents
August 28, 1995	Barbara Comstock		Natalie Williams
		SUBJECT:	Limited access to

			documents
August 30, 1995	William F. Clinger, Jr.	SUBJECT:	Abner J. Mikva Answers Questions
September 1, 1995	Barbara Comstock	SUBJECT:	Jane C. Sherburne Answers Questions
September 1, 1995	Kevin Sabo	SUBJECT:	Jane C. Sherburne Procedures for Interview
September 5, 1995	Barbara Comstock	SUBJECT:	Natalie Williams Limited access to documents
September 6, 1995	Abner Mikva	SUBJECT:	William F. Clinger, Jr. Requests for Documents
September 6, 1995	Jane C. Sherburne	SUBJECT:	Barbara K. Bracher 130 Requests for Information
September 8, 1995	William F. Clinger, Jr.	SUBJECT:	Abner J. Mikva Procedures for Documents
September 12, 1995	Barbara K. Bracher	SUBJECT:	Jane C. Sherburne Limited access to documents
September 15, 1995	Barbara K. Bracher	SUBJECT:	Jane C. Sherburne Answers Questions
September 18, 1995	Barbara K. Bracher	SUBJECT:	Jane C. Sherburne Limited access to documents
September 18, 1995	Abner Mikva	SUBJECT:	William F. Clinger, Jr. Requests for Documents
September 18, 1995	Abner Mikva	SUBJECT:	William F. Clinger, Jr. Requests for Documents

127 Barbara Comstock is an Investigative Counsel with the House Committee , Government Rcform and Ovcrsight.

128 Natalie R. Williams, at the time ofthe letter, was an Associated Counsel at the White House.

129 Jane C. Sherburne is a Spccial Counsel at the White House,

130 Barbara K. Bracher is the Chief Investigative Counsel with the House Committee on Government Reform and Ovcrsight.

Congressional Press Releases, May 29, 1996

DATE	TO	FROM
September 20, 1995	Jane Sherburne SUBJECT:	Barbara K. Bracher Request for Documents
September 20, 995	Barbara K. Bracher SUBJECT:	Jane C. Sherburne Limited Access to Docum.
September 22, 1995	Barbara K. Bracher SUBJECT:	Jane C. Sherburne Limited Access to Docum.
September 25, 1995	Barbara K. Bracher SUBJECT:	Jane C. Sherburne Limited Access to Docum.
September 27, 1995	William F. Clinger, Jr. SUBJECT:	Abner K. Mikva Answers Questions
September 28, 995	Barbara K. Bracher SUBJECT:	Jane C. Sherburne Limited Access to Docum.
October 4, 1995	Barbara K. Bracher SUBJECT:	Jane C. Sherburne Limited Access to Docum.
October 5, 1995	Barbara K. Bracher SUBJECT:	Jane C. Sherburne Limited Access to Docum.
October 11, 1995	Terry Good 131 SUBJECT:	William F. Clinger Request for Documents
October 11, 1995	Abner Mikva SUBJECT:	William F. Clinger Request for Documents
October 12, 1995	Kevin Sabo SUBJECT:	Jane C. Sherburne Procedures for Documents
October 13, 1995	Barbara K. Bracher SUBJECT:	Jane C. Sherburne Request for Documents
October 13, 1995	Jane Sherburne SUBJECT:	Barbara K. Bracher Limited Access to Docum.
October 13, 1995	Barbara K. Bracher SUBJECT:	Jane C. Sherburne Limited Access to Docum.
October 13, 1995	Barbara K. Bracher SUBJECT:	Jane C. Sherburne Limited Access to Docum.
October 16, 1995	Barbara Comstock SUBJECT:	Natalie Williams Limited Access to Docum.
October 17, 1995	Barbara K. Bracher SUBJECT:	Jane C. Sherburne Limited Access to Docum.
October 18, 1995	William F. Clinger, Jr. SUBJECT:	Abner K. Mikva Promise to Produce Docum.

October 20, 1995	Jane Sherburne		Barbara K. Bracher
		SUBJECT:	Request for Documents
October 21, 1995	Barbara K. Bracher		Jane C. Sherburne
		SUBJECT:	Promise to Produce Docum.
October 23, 1995	Abner Mikva		William F. Clinger
		SUBJECT:	Clarification of Doc. Request
November 2, 1995	Jane Sherburne		Barbara Comstock
		SUBJECT:	Clarification of Doc. Request
November 6, 1995	Barbara K. Bracher		Jane C. Sherburne
		SUBJECT:	Procedures for Documents
November 8, 1995	Jane Sherburne		Barbara K. Bracher
		SUBJECT:	Procedures for Documents
November 13, 1995	Jane Sherburne		Barbara K. Bracher
		SUBJECT:	Procedures for Documents
November 14, 1995	John M. Quinn 132		William F. Clinger
		SUBJECT:	Request for Documents
November 14, 1995	Barbara K. Bracher		Jane C. Sherburne
		SUBJECT:	Limited Access to Docum.
November 29, 1995	John M. Quinn		William F. Clinger
		SUBJECT:	Request for Documents
November 29, 1995	Jane Sherburne		Barbara K. Bracher
		SUBJECT:	Clarification of Doc. Request
December 14, 1995	John M. Quinn		William F. Clinger
		SUBJECT:	Request for Documents
December 20, 1995	William F. Clinger, Jr.		John M. Quinn
		SUBJECT:	Promise to Produce Docum.
December 22, 1995	Barbara K. Bracher		Jane C. Sherburne
		SUBJECT:	Limited Access to Docum.
January 2, 1996	Thomas F. McLarty		William F. Clinger
		SUBJECT:	Request for Information
January 3, 1996	Barbara K. Bracher		Jane C. Sherburne
		SUBJECT:	Limited Access to Docum.
January 11, 1996	John M. Quinn		William F. Clinger
		SUBJECT:	Request for Information